NO. 80-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, ET AL.,
Petitioners,

v.

WESLEY P. BERNARD, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed September 17, 1980

Certiorari Granted December 8, 1980

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

May 18, 1976—Plaintiffs' original petition filed in U.S. District Court for Eastern District of Texas, Beaumont Division.

May 27, 1976—Defendant Gulf's motion to limit communications with any potential or actual class member filed.

May 28, 1976—Order signed by Judge Steger limiting communications with any potential or actual class members.

June 8, 1976—Defendant Gulf's motion to modify order limiting communications filed.

June 11, 1976—Hearing held on motion to modify order limiting communications.

June 17, 1976—Motion by defendant Gulf Oil Corporation to dismiss complaint filed.

June 22, 1976—Order entered by Judge Fisher modifying Judge Steger's order limiting communications with any potential or actual class members.

June 30, 1976—Notice mailed to Gulf's Port Arthur, Texas, refinery employees as per order of June 22, 1976.

July 1, 1976—Plaintiff's motion to amend complaint filed.

July 6, 1976—Plaintiffs' motion for permission to communicate with members of the proposed class filed.

July 19, 1976—Order entered permitting plaintiffs to file amended complaint.

July 28, 1976—Motion by defendant Gulf Oil Corporation to dismiss amended complaint filed.

July 30, 1976—Defendant Oil Chemical and Atomic Workers' International Union, Local Union No. 4-23, response to plaintiffs' amended complaint filed.

August 10, 1976—Order entered denying plaintiffs' motion for permission to communicate with the proposed class.

August 25, 1976—Oil, Chemical and Atomic Workers International Union and Local No. 4-23 of the OCAW joins defendant Gulf Oil Company in its motion to dismiss.

September 2, 1976—Report to the court by Gulf Oil Corporation of individuals who have accepted benefits under the conciliation agreement.

September 24, 1976—Hearing held on defendant's motion to dismiss.

November 29, 1976—Order entered that motion to dismiss filed by defendant shall be treated as motion for summary judgment and that parties should submit all pertinent materials to said motion by January 3, 1977.

January 11, 1977—Order that summary judgment be granted for the defendants as to both the class action and any individual claims of discrimination by the plaintiffs.

February 9, 1977—Plaintiffs' notice of appeal filed.

June 15, 1979—Opinion of the Court of Appeals for the Fifth Circuit.

September 27, 1979—Order entered granting rehearing *en banc* in the Court of Appeals for the Fifth Circuit.

June 19, 1980—Opinion of the Court of Appeals *en banc*.

July 17, 1980—Judgment of Court of Appeals rehearing *en banc*.

December 8, 1980—Order entered by Supreme Court of the United States allowing certiorari.

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
5-18-76	1	COMPLAINT Issued Summons and delivered to U. S. Marshal, Beaumont, Texas.
5-25-76	11	Marshal's Return on Summons to Gulf Oil Company, served to R. B. Short, Ref. Manager, on 5-24-76 at 3:50 p.m. $9.00
5-27-76	12	MOTION by Gulf to Limit Communications with any Potential or Actual Class Member submitted by Atty., Joseph H. Sperry for Defendant, Gulf Oil Company.
5-27-76	16	MEMORANDUM in Support of Gulf's Motion to Limit Communications with any Potential or Actual Class Member.
5-28-76	20	ORDER signed by Judge Steger on Motion by Gulf to Limit Communications with any potential or actual class member. This ORDER shall be effective until Judge Fisher returns and can hear the matter upon formal motion. Attys. of Record apprised. V.74,P.10
5-28-76	22	Marshal's Return on Summons, served to Mr. Parker on 5-26-76 at 12:10 p.m. $9.00
6-7-76		Hearing on Motion by Gulf Oil to Limit Communications with any potential or actual class member for Friday, June 11, at 10:00 a.m. by Judge Fisher. Attys. of Record notified by telephone Monday, June 7, 1976, and follow-up letter.

DATE	NR.	PROCEEDINGS
6-8-76	23	NOTICE OF MOTION TO MODIFY ORDER by Defendant.
6-8-76	24	MEMORANDUM IN SUPPORT OF GULF OIL CORPORATION'S MOTION TO MODIFY ORDER.
6-8-76	38	MOTION TO MODIFY ORDER. Attys. of Record apprised.
6-10-76	40	MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT GULF OIL COMPANY'S MOTION TO LIMIT COMMUNICATIONS WITH ANY POTENTIAL OR ACTUAL CLASS MEMBER, by Plaintiff.
6-10-76	81	Defendant, Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23 Response to Plaintiff's ORIGINAL COMPLAINT.
6-16-76	85	FIRST SUPPLEMENTAL MEMORANDUM IN SUPPORT OF GI LF's MOTION TO MODIFY ORDER.
6-17-76	97	MOTION by Defendant Gulf Oil Corporation to Dismiss Complaint. Attorneys of Record apprised.
6-17-76	99	MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT GULF OIL COMPANY'S MOTION TO MODIFY ORDER, by Plaintiff.
6-22-76	117	ORDER that motion of Gulf Oil Corporation to modify Judge Steger's Order is granted and that Judge Steger's Order of May 28, 1976 be modified. s/Judge Fisher. Attorneys of record apprised. V.74,P.

DATE	NR.	PROCEEDINGS
7-1-76	123	MOTION to Amend Complaint.
7-1-76	125	MEMORANDUM OF LAW IN SUPPORT of Plaintiffs' Motion to Amend.
6-30-76	128a-128e	Notice (Appendix I) mailed to Port Arthur, Texas Gulf Refinery employees as per Order of June 22, 1976.
7-6-76	129	MOTION FOR PERMISSION TO COMMUNICATE WITH MEMBERS OF THE PROPOSED CLASS by Plaintiffs. Attys. of Record apprised.
7-6-76	135	MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PERMISSION TO COMMUNICATE WITH MEMBERS OF THE PROPOSED CLASS.
7-15-76	142	MEMORANDUM ON BEHALF OF GULF OIL CORPORATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR PERMISSION TO COMMUNICATE WITH MEMBERS OF THE PROPOSED CLASS.
7-19-76	150	ORDER granting Plaintiff's MOTION TO AMEND COMPLAINT. s/Judge Fisher. Attys. of Record Apprised. V.75,P.44
7-19-76	151	AMENDED COMPLAINT by Plaintiff.
7-28-76	162	MOTION BY DEFENDANT GULF OIL CORPORATION TO DISMISS AMENDED COMPLAINT. Attys. of Record apprised.
8-6-76	164	MEMORANDUM in Support of Defendant, Gulf Oil Corporation's, Motion to Dismiss Amended Complaint.

DATE	NR.	PROCEEDINGS
8-6-76	204	AFFIDAVIT OF NACHA I. MARTINEZ with reference to Willie Johnson, Sr.
8-6-76	208	AFFIDAVIT OF NACHA I. MARTINEZ with reference to Elton Hayes, Sr.
8-6-76	210	AFFIDAVIT OF NACHA I. MARTINEZ with reference to Rodney Tizeno.
8-6-76	212	AFFIDAVIT OF NACHA I. MARTINEZ with reference to Wesley P. Bernard.
8-6-76	216	AFFIDAVIT OF NACHA I. MARTINEZ with reference to Willie Whitley.
8-6-76	222	AFFIDAVIT OF HERBERT C. McCLEES with reference to Willie Whitley.
8-6-76	228	AFFIDAVIT OF HERBERT C. McCLEES with reference to Willie Johnson, Sr.
8-6-76	231	AFFIDAVIT OF HERBERT C. McCLEES with reference to Hence Brown.
8-6-76	234	AFFIDAVIT OF NACHA I. MARTINEZ with reference to Hence Brown.
8-6-76	238	AFFIDAVIT OF HERBERT C. McCLEES with reference to Wesley Bernard.
8-30-76	241	DEFENDANT, OIL, CHEMICAL AND ATOMIC WORKERS' INTERNATIONAL UNION, LOCAL UNION NO. 4-23 RESPONSE TO PLAINTIFFS' AMENDED COMPLAINT.

DATE	NR.	PROCEEDINGS
8-10-76	245	ORDER on Plaintiffs' Motion for Permission to Communicate with the Proposed Class is DENIED. s/Judge Fisher. Attorneys of Record apprised. V.75,P.142
8-20-76	246	MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT GULF OIL COMPANY'S MOTION TO DISMISS AMENDED COMPLAINT.
8-25-76	256	OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AND LOCAL 4-23 of the OCAW joins, Defendant, Gulf Oil Company, in its MOTION TO DISMISS. Attys. of Record apprised.
9-2-76	258	REPORT TO THE COURT BY GULF OIL CORPORATION OF INDIVIDUALS WHO HAVE ACCEPTED BENEFITS UNDER THE CONCILIATION AGREEMENT.
9-2-76	273	MOTION FOR ORAL ARGUMENT ON GULF'S MOTION TO DISMISS. Attys. of Record apprised.
9-14-76	274	ORDER that oral arguments on Gulf's Motion to Dismiss will be set on September 24, 1976 at 10:00 a.m. Signed by Judge Fisher. Attys. of Record apprised. V.76,P.77
9-24-76		Hearing held on Defendant's Motion to Dismiss. Motion taken under Advisement. Counsel given to 10-15-76 to file Memoranda or Briefs: Deft. given to 10-22-76 to file proposed Findings of Fact and Conclusions of Law and

DATE	NR.	PROCEEDINGS
		Pltf given to 10-29-76 to file objections to such proposed Findings of Fact and Conclusions of Law.
9-23-76	275	Plaintiffs' Supplemental Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint.
10-7-76	287	Plaintiffs' Motion for an Order Permitting the Appearance of Additional Counsel, Patrick O. Patterson, Esq.
10-18-76	289	LETTER BRIEF with regards to Defendants' Motion to Dismiss the Amended Complaint, by Plaintiffs. (Apparently, Original copy was mailed to Judge Fisher).
10-15-76	301	Supplemental Memorandum in Support of Defendants' Motion to Dismiss.
10-15-76	315	Affidavit of C. B. Draper.
10-14-76	321	ORDER entered by Judge Fisher granting motion for Patrick O. Patterson, 10 Columbus Circle, Suite 2030, New York, New York 10019 leave to appear as additional counsel for Plaintiff. Certified copy to all counsel of record. V.76,P.274
10-26-76	323	Plaintiffs' SECOND SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT with proposed FINDINGS OF FACT AND CONCLUSIONS OF LAW.

DATE	NR.	PROCEEDINGS
10-29-76	337	Defendants' SECOND SUPPLEMENTAL MEMORANDUM OF LAW in Support of its Motion to Dismiss the Amended Complaint.
11-24-76	343	NOTICE of Motion, by Plaintiffs.
11-24-76	344	MOTION to Join Additional Defendants and for Leave to Amend Complaint filed by Plaintiffs. JJF 11-30-76.
11-24-76	355	MEMORANDUM OF LAW in Support of Plaintiffs' Motion to Join Additional Defendants and to Amend Complaint.
11-24-76	361	AFFIDAVIT of Wesley P. Bernard.
11-29-76	367	ORDER that Motion to Dismiss be treated as motion for summary judgment under Rule 56, F.R.Civ. P. and that the parties submit all pertinent materials to said motion by 1-3-77, JJF Attorneys notified. V.77,P.
12-17-76	368	MEMORANDUM in Support of Gulf's Limited Opposition to Plaintiffs' Motion to Join Additional Defendants and for Leave to Amend Complaint. JJF 12-17-76.
1-3-77	381	Plaintiffs' MEMORANDUM in Response to Order Treating Defendants' Motion to Dismiss as a Motion for Summary Judgment. JJF 1-3-77.

DATE	NR.	PROCEEDINGS
1-11-77	387	ORDER that summary judgment be granted for the defendants as to both the class action and any individual claims of discrimination by the plaintiffs. JJF s/1-11-77. Attorneys notified. V.78,P.
2-9-77	392	NOTICE OF APPEAL to U. S. Court of Appeals, Fifth Circuit, by Plaintiffs from Order of Dismissal entered on January 11, 1977. Certified copy of Notice of Appeal mailed to Fifth Circuit Court of Appeals, New Orleans, LA, Jerry Bloxom, U. S. Court Reporter, Beaumont, Texas, Judge Fisher, and all attorneys of record.
2-9-77	393	AFFIDAVIT of Cecil L. Cain, with Calcasieu Insurance Agency, Inc. of Lake Charles, LA, who has applied for a surety bond with the WESTERN SURETY COMPANY.
2-18-77	395	BOND for Costs through Western Surety Company of Sioux Falls, SD for $250.00.

In The
UNITED STATES DISTRICT COURT
For The Eastern District Of Texas
Beaumont Division

CIVIL ACTION NO. B-76-183-CA

WESLEY P. BERNARD, ELTON HAYES, SR., RODNEY TIZENO, HENCE BROWN, JR., WILLIE WHITLEY, WILLIE JOHNSON, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

GULF OIL COMPANY and OIL, CHEMICAL and ATOMIC WORKERS INTERNATIONAL UNION, LOCAL UNION NO. 4-23,
Defendants.

COMPLAINT

I.

NATURE OF CLAIM

1. This is a proceeding for declaratory and preliminary injunctive relief and for damages to redress the deprivation of rights secured to plaintiffs and members of the class they represent by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981.

II.

JURISDICTION

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1334(4), 42 U.S.C. § 2000e-5(f), 2201 and 2202, this being a suit in equity authorized and instituted pursuant to the Civil Rights Acts of 1866, 42 U.S.C. § 1981, and 1964, 42 U.S.C. §§ 2000e *et seq.* The jurisdiction of this Court is invoked to secure the protection of and to redress deprivation of rights secured by (a) 42 U.S.C. §§ 2000e *et seq.*, providing for injunctive and other relief against discrimination in employment on the basis of race and (b) 42 U.S.C. § 1981 providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States.

III.

CLASS ACTION

3. Plaintiffs bring this action on their own behalf, and pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure as a class action on behalf of those similarly situated. The members of the class and/or subclasses represented by plaintiffs are: (a) all black employees employed by defendant Gulf Oil Company in Port Arthur, Texas; (b) all black employees formerly employed by Gulf Oil Company in Port Arthur, Texas; and (c) all black applicants for employment at Gulf Oil Company who have been rejected for employment at said company. The requirements of the Federal Rules are met in that:

a. The members of the class are so numerous that joinder of all members would be impracticable. There are, for example, more than 300 blacks employed by Gulf Oil Company in Port Arthur, Texas;

b. There are questions of law and fact common to the class. It is alleged herein that defendants have discriminated against virtually every black employed by Gulf Oil Company in respect to the terms and conditions of their employment;

c. The claims of the plaintiffs are typical of the claims of the class and/or subclasses;

d. The plaintiffs will fairly and adequately protect the interests of the classes and subclasses. The interests of the plaintiffs are identical or similar to those of the class members;

e. The defendants have acted and refused to act on grounds generally applicable to the class and subclasses, thereby making appropriate final injunctive and declaratory relief with respect to all members of the classes;

f. The questions of law and fact common to the members of the class and subclasses predominate over questions affecting only individual members; a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

IV.

PLAINTIFFS

4. Plaintiff Wesley P. Bernard is a black citizen of the United States and Port Arthur, Texas. Plaintiff Bernard has been employed by Gulf Oil Company since June 16, 1954. He was hired as a laborer and is presently a truck driver.

5. Plaintiff Elton Hayes, Sr., is a black citizen of the United States and Port Arthur, Texas. Plaintiff Hayes has been employed at Gulf Oil Company since October 2, 1946. He was hired as a laborer and is presently a boilermaker, having worked at various "helper" positions during his employment at Gulf Oil Company.

6. Plaintiff Hence Brown, Jr., is a black citizen of the United States and Port Arthur, Texas. Plaintiff Brown was hired as a laborer in 1954 and presently works as a truck driver.

7. Plaintiff Willie Whitley is a black citizen of the United States and Port Arthur, Texas. He was hired in 1946 as a laborer and retired in October, 1975, as a utility man, a classification slightly above a laborer classification.

8. Plaintiff Rodney Tizeno is a black citizen of the United States and Port Arthur, Texas. Plaintiff Tizeno was hired originally as a laborer and is presently a craftsman at Gulf Oil Company.

9. Plaintiff Willie Johnson is a black citizen of the United States and Port Arthur, Texas. Plaintiff Johnson was hired as a laborer at Gulf Oil Company.

V.

DEFENDANTS

10. Defendant Gulf Oil Company in Port Arthur, Texas (hereinafter simply Gulf Oil) is a corporation incorporated and/or doing business in the State of Texas. It operates and maintains a manufacturing plant in Port Arthur, Texas which produces a variety of oil and petroleum products and by-products. Gulf Oil is a corporation

engaged in interstate commerce, employing more than fifteen persons, and is an employer within the meaning of 42 U.S.C. §§ 2000e-(b).

11. Defendant Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23 is recognized as the exclusive bargaining representative of operating and maintenance employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions and terms of employment. Local Union No. 4-23 is a labor organization within the meaning of 42 U.S.C. § 2000e-(d),(e).

VI.

STATEMENT OF FACTS

12. Black employees of Gulf Oil are, and have in the past, been victims of systematic racial discrimination by defendants Gulf Oil and Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23. Prior and subsequent to July 2, 1965, Gulf Oil engaged in policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*) and 42 U.S.C. § 1981 which discriminate or have the effect of discriminating against plaintiffs and the classes they represent because of their race and color.

13. The methods of discrimination include, but are not limited to, intentionally engaging in the following practices:

a. Hiring and Assignment: Gulf Oil unlawfully has assigned and continues to assign a disproportionately large number of black employees to the Company's

lowest paying, least preferred, and more physically demanding jobs;

b. White employees are given preference in initial employment and job assignments by Gulf Oil. The company utilizes a battery of tests which discriminates or has the effect of discriminating against blacks in initial employment with the Company. In addition, Gulf Oil maintains a high school diploma requirement and, on information and belief, other pre-employment criteria which discriminate or have the effect of discriminating against black applicants. Because of discrimination in hiring and job assignment, a disproportionately large number of whites have been preferentially hired by Gulf Oil for higher paying jobs than blacks with substantially the same or better qualifications. Black employees are now, and have in the past, been paid less money for harder work under less desirable working conditions than their white counterparts;

c. The use of a pre-employment test battery is legally deficient in one or more of the following ways: (1) it is not professionally developed; (2) it has little or no relationship to successful job performance; (3) it has little or no relationship to the job sought or applied for; (4) it exhibits a racial and cultural bias against blacks;

d. Defendant company employs a disproportionately small number of blacks in permanent craft positions. Blacks have been historically excluded from higher paying craft positions by Gulf Oil;

e. Gulf Oil has failed and/or refused to promote black employees and "helpers" to journeymen posi-

tions, irrespective of their ability to perform the job or position sought;

f. As a result of the Company's racial promotion and upgrading practices, "black" lines of progression, job classifications and departments have been artificially established and developed with the result that blacks have been and are now confined to the lower-paying and less-preferred jobs than are their white counterparts;

g. Black employees have been denied training, access and exposure to craft positions and other instructions which are necessary to an upgrade or promotion. Blacks who perform the same or comparable work as whites are given unequal pay and compensation;

h. On information and belief, Gulf Oil also discriminatorily denies blacks their full employment rights in that it denied blacks who work in largely minority occupied jobs or departments, seniority rights, opportunities, and privileges. Generally, Gulf Oil has refused and/or failed to recognize the full seniority rights of its black employees, adversely affecting their discharges, training, upgrade, transfer, and promotion rights.

g. On information and belief, Gulf Oil has discriminatorily excluded blacks and has refused and/or failed to recruit and train blacks for supervisory, technical, professional, and clerical positions;

h. Gulf Oil discriminatorily assesses discipline and discharge against black employees for reasons which would not be grounds for discipline or discharge of whites in similar positions;

14. Defendant Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23 has agreed to, acquiesced in or otherwise condoned the unlawful employment practices referred to in paragraph VI(13)(a-h), *supra.*

VII.

EXHAUSTION OF REMEDIES

15. Neither the State of Texas nor the City of Port Arthur has a law prohibiting the unlawful practices herein alleged.

16. All jurisdictional prerequisites to this action have been satisfied. This action is timely commenced under both 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981.

VIII.

PRAYER FOR RELIEF

THEREFORE, plaintiffs and the classes represented pray as follows:

A. That this Court formally determine, pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, that this action is maintainable on behalf of the class and/or subclasses described in paragraph III(3), *supra.*

B. That this Court issue affirmative relief as follows:

a. that Gulf Oil be required to institute an active recruitment policy;

1. That Gulf Oil be required to canvass the qualifications of all its black employees with the goal to pro-

mote all such qualified employees and to eliminate all present effects of past racial discrimination with the following provisions:

a. that plaintiffs and the classes be afforded full utilization of company seniority in bidding for or seeking better paying and more desirable jobs;

b. restructuring lines of progression, revision of applicable residency requirements, advanced level entry, and job skipping at Gulf Oil Company;

c. training and other assistance as necessary to enable the plaintiffs and the class to overcome the effects of past discrimination;

d. an award of back pay to each plaintiff and class member for any financial losses suffered by plaintiffs and the classes and which are attributable to acts of racial discrimination complained of herein;

e. rate protection sufficient to assure that black employees will not be economically discouraged, prevented or penalized in their efforts to attain their rightful place in Gulf Oil's employment structure;

f. prospective red circling to alleviate the residual effects of any racial discrimination not corrected or completely removed by this action;

g. Gulf Oil be required to suspend the use of any and all tests or other criteria for promotion or for initial employment until said tests or criteria are validated in accordance with the Equal Employment Opportunity Commission Guidelines on Testing;

h. that the defendant Union, Local 4-23, be required to file all grievances of its black members of Gulf Oil;

i. enter a declaratory judgment that the acts and practices complained of are in violation of the laws of the United States;

j. that plaintiffs and the classes they represent be awarded their complete costs of this action, including a reasonable attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k).

k. Grant Plaintiffs and the classes they represent such other and further relief as may be necessary and proper.

Respectfully submitted,

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Attorneys for Plaintiffs

MOTION BY GULF TO LIMIT COMMUNICATIONS WITH ANY POTENTIAL OR ACTUAL CLASS MEMBER

[Caption Omitted in Printing]

Filed May 27, 1976

Comes now Gulf Oil Corporation (Gulf), a Defendant in the above-captioned suit, and moves this Court for an order limiting communications by parties to this suit and their counsel with any actual or potential class members.

In support of this Motion, Gulf has attached a memorandum brief.

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By J. H. SPERRY
Attorneys for Defendant
GULF OIL CORPORATION

[Certificate of Service Omitted in Printing]

MEMORANDUM IN SUPPORT OF GULF'S MOTION TO LIMIT COMMUNICATIONS WITH ANY POTENTIAL OR ACTUAL CLASS MEMBER

[Caption Omitted in Printing]

Filed May 28, 1976

This is a class action suit brought by six individual employees of Gulf's Port Arthur Refinery alleging they have been victims of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and of the Civil Rights Act of 1866, 42 U.S.C. § 1981. The suit was filed on May 18, 1976, and Gulf was served with a summons on May 24, 1976.

The issues which have been raised in this lawsuit have been the subject of settlement negotiations between Gulf, the U.S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior. The negotiations between Gulf and these federal agencies to conciliate the issues which now have been raised in this action have taken place over a period of several years and have resulted in the signing by Gulf of a Conciliation Agreement. This agreement, which was entered into by Gulf and the Federal Agencies on April 14, 1976, provided for an award of over $900,000 to 614 present and former black employees and 29 female employees at Gulf's Port Arthur Refinery. A copy of this Conciliation Agreement is attached hereto as Exhibit A.

As soon as the Conciliation Agreement was finalized, Gulf pursuant to the terms of the Conciliation Agreement mailed a letter and release, the form of which was

approved by the Federal Agencies, notifying all employees covered by the Conciliation Agreement that they were entitled to an award of back pay and that upon execution of the receipt and general release the employees would receive the back pay award. Between the time the Conciliation Agreement was executed by Gulf, and the date the summons was served upon Gulf in this action, approximately 452 employees out of a total of 643 employees entitled to a back pay award had executed the receipt and general release and had received their back pay checks.

So as to comply with the letter and spirit of Rule 23 (e), F.R.C.P. and the Canons of Ethics of the Bar Association, Gulf immediately upon service of the summons suspended all further mailings to actual or potential class members and informed all actual or potential class members who called Gulf that no further communications concerning the Conciliation Agreement or the issues raised in the lawsuit could be discussed with them until the Court so orders. Attached hereto as Exhibit B is a copy of the statement which was read to all potential and actual class members who called Gulf inquiring about these matters.

However, on Saturday, May 22, 1976, four days after the Complaint was filed in this action, an attorney for the Plaintiffs, Mr. Ulysses Gene Thibodeaux, appeared before approximately 75 actual or potential class members at a meeting in Port Arthur and discussed with them the issues involved in the case and recommended to those employees that they do not sign the receipt and general release which had been mailed to them pursuant to the Conciliation Agreement. In fact, it is reported to Gulf

that Mr. Thibodeaux advised this group that they should mail back to Gulf the checks they had received since he could recover at least double the amount which was paid to them under the Conciliation Agreement by prosecuting the present lawsuit.

Gulf believes that this action by the Plaintiffs' attorney is indeed a serious breach of the ethical and legal standards which are imposed upon attorneys under the Canons of Ethics and the law. In order to prevent further communications of this type by all parties and their counsel to this suit, Gulf has moved the Court for an order to limit communications with any potential or actual class member to this lawsuit. The order which Gulf proposes be entered pursuant to its Motion is copies verbatim from "Sample Pretrial Order No. 15—Prevention of Potential Abuse of Class Actions" contained in the *Manual for Complex and Multidistrict Litigation*, p. 197. This order is also identical to many local rules of the United States District Courts which have adopted "Suggested Local Rule No. 7—Prevention of Potential Abuse of Class Actions" contained in the *Manual for Complex and Multidistrict Litigation* on p. 196.[1] It should be noted that the *Manual for Complex and Multidistrict Litigation* suggests that such an order be promptly entered in actual and potential class action cases unless there is a parallel local rule.

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1. See Local Rules of the U.S. District Court for the Southern District of Texas, Rule 6; and the General Rules of the U.S. District Court for the Eastern District of Louisiana, Rule 2.12e.

By entering the suggested order, this Court will preserve the status quo of the case until Judge Fisher returns and can assume control and administration of the case. In the absence of such an order, Gulf feels that the unusual circumstances involved in this case, combined with the statements which Plaintiffs' counsel has already made to actual and potential class members, could seriously prejudice Gulf in its defense of this case and the conciliation efforts which have been conducted by the Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior.

CONCLUSION

In accordance with the above stated authorities, Gulf urges the Court to grant its Motion to Limit Communications with any Potential or Actual Class Member.

[Signatures Omitted in Printing]

Exhibit A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Houston District Office
2320 La Branch, Room 1101
HOUSTON, TEXAS 77004

AREA CODE 713
226-5611

CONCILIATION AGREEMENT

In the Matter of:

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

and

Gulf Oil Company—U.S. Charge No. AU68-9-154E
Port Arthur, Texas
Respondent

and

Office for Equal Opportunity
U.S. Department of the Interior
Compliance Agency

* * *

A charge having been filed under Title VII of the Civil Rights Act of 1964, as amended, by a Commissioner of the U. S. Equal Employment Opportunity Commission against the Respondent, the charge having been investigated and reasonable cause having been found, the parties do resolve and conciliate this matter as follows:

[Table of Contents Omitted in Printing]

A. GENERAL PROVISIONS

1. It is understood that this Agreement does not constitute an admission by the Respondent of any violation of Title VII of the Civil Rights Act of 1964, as amended.

2. The U.S. Equal Employment Opportunity Commission hereby waives and releases its cause of action against the Respondent under the instant charge and covenants not to sue the Respondent independently or on behalf of any individual including, but not necessarily limited to, persons listed on Attachments "A" and "B" hereto with respect to any matter alleged thereunder, subject to performance by the Respondent of the promises and representations contained herein.

3. The Respondent understands that the Commission, on its own motion, may review compliance with this Agreement. As a part of such review, the Commission may require written reports concerning compliance, may inspect the premises, examine witnesses, and examine and copy documents pertinent to such review. The Commission agrees that the Respondent reserves all rights and protection afforded by the Freedom of Information Act, as amended.

4. The Respondent reaffirms that all of its hiring, promotion practices, classification, assignments, layoffs and all other terms and conditions of employment shall be maintained and conducted in a manner which does not discriminate on the basis of race, color, religion, sex or national origin in violation

of Title VII of the Civil Rights Act of 1964, as amended.

5. The Respondent agrees that it will not knowingly practice nor permit its supervisory or other personnel to practice discrimination or retaliation of any kind against any person because of his or her opposition to any practice declared unlawful under Title VII of the Civil Rights Act of 1964, as amended, or because of the filing of a charge, or giving of testimony or assistance, or participation in any manner in any investigation, proceeding, or hearing under Title VII of the Civil Rights Act of 1964, as amended.

6. Recognizing the exception with respect to sex or regards toilets, showers and the like, the Respondent reaffirms that all facilities on the premises or furnished its employees, including recreational opportunities and all other conveniences and services, are available for the use and enjoyment of any employee without regard to race, color, religion, sex or national origin; that there is no discrimination against any employee on said grounds with respect to the use of facilities; and that the notices required to be posted by Title VII of the Civil Rights Act of 1964, as amended, are posted.

B. SETTLEMENT AGREEMENT—BACK PAY

1. Appertaining to back pay, the Affected Class is hereby defined as all Negroes employed by the Respondent on July 2, 1965, whose seniority date antecedes January 1, 1957, and all hourly rated females employed by the Respondent in its Package and Grease Department on July 2, 1965.

2. The Commission agrees that a thorough search has been made to identify all individuals potentially entitled to backpay under this Agreement, that the Respondent's personnel records since the effective date of Title VII of the Civil Rights Act of 1964 have been exhaustively analyzed and that, through examination of documents submitted by the Respondent, no persons potentially entitled other than those listed on Attachments "A" and "B" hereto could be found.

3. For the sake of convenience, the Affected Classes, as shown on Attachments "A" and "B", shall be designated and hereinafter referred to as Group "A" and Group "B" respectively.

4. The Respondent agrees that all individuals identified as belonging to Group "A" or Group "B" shall immediately be awarded upon notification of acceptance as described below, such back pay as is hereinafter provided:

   a. The Respondent represents that it has set aside a sum for purposes of fulfilling all back pay obligations which are or might have been incurred as a result of employment practices complained of in the instant charge or which were treated in the Commission's Letters of Determination or Reconsideration of Determination thereon, including matters found by the Commission to be like and related.

   b. The United States Equal Employment Opportunity Commission concurs that the sum set aside is sufficient to meet the purposes of providing

equitable relief to designated members of Group "A" or Group "B" and stipulates that $35,000.00 of said amount may be reserved and held in a special account by the Respondent for a period of five years. The Commission agrees that, insofar as matters encompassed by this Agreement are raised to issue in the future, the Respondent shall utilize its special account to dispose of contingent liabilities, and that any undispensed funds remaining, after passage of the account's established five year life, shall be returned to the Respondent's general control for unrestricted use.

c. In formulating the specific relief due each individual hereunder credits will be awarded as follows:

(1) To members of Group "A", $5.62 for each month of continuous service with the Respondent prior to January 1, 1957, and $2.81 for each month of continuous service thereafter until date of termination or until January 1, 1971, whichever occurs earlier.

(2) To members of Group "B", $5.62 for each month of continuous service with the Respondent until date of termination or until January 1, 1975, whichever occurs earlier.

d. Back pay awards previously tendered to members of Group "A" under the Respondent's Agreement dated May 7, 1971, with the Office for Equal Opportunity, United States Department of the Interior shall be deducted from amounts hereunder due those same individuals.

e. Back pay awards will be subject to standard deductions for F.I.C.A. and Federal Income Tax Withholding.

f. Upon accepting a back pay award, each Group "A" or Group "B" member will be required to execute a general release to the Respondent for any and all claims against the Respondent as a result of events arising from its employment practices occurring on or before the date of release, or which might arise as the result of the future effects of past or present employment practices.

g. Prior to tendering back pay awards, the Respondent agrees to notify in writing each member belonging to Group "A" or Group "B" that he or she has been so identified, and of the general formula used to calculate awards and of the conditions of waiver or release required in accepting back pay. Each member shall be furnished a form on which to notify the Respondent, within thirty days, whether such member desires to accept or decline back pay consideration. A failure on the part of any member to respond within thirty days shall be interpreted as acceptance of back pay. It is agreed that the form of notification to be utilized shall be reviewed and signed by a Commission representative prior to being implemented or disseminated.

h. In the event that a member of Group "A" or Group "B" is deceased, notice shall be given and payment made to his or her estate. Upon accepting a back pay award, the deceased member's

heir or heirs shall be required to execute a general release as is provided in subsection (f) hereinabove.

i. In the event that a member of Group "A" or Group "B" refuses his or her award, or cannot be located or, if deceased, his heir or heirs cannot be located through the exercise of reasonable effort, his or her back pay award shall be placed in the Respondent's special account as provided in subsection (b) above, to be returned to the Respendent's general control, if unclaimed upon expiration of the account's life.

C. SETTLEMENT AGREEMENT—GOALS AND TIMETABLES

1. a. For Affirmative Action purposes, the Affected Class is hereby defined as all hourly rated females presently employed in the Respondent's Package and Grease Department whose seniority date antecedes April 5, 1974 and all members of back pay Group "A" who are presently employed in the classification of Operator Helper No. 1, Boiler Washer "X", Brander "X", Operator Helper No. 2, Utility Helper or Laborer.

b. For the sake of convenience, the Affected Class for Affirmative Action purposes shall be designated and hereinafter referred to as Group "C".

2. The Respondent, firm in its commitment to act in good faith and compliance with Title VII of the Civil Rights Act of 1964, as amended, has conducted a thorough analysis of its work force and has,

as of January 1, 1976, identified those classifications wherein Negroes, Spanish Surnamed Americans and/or females are statistically underrepresented. Said classifications, designated and hereinafter referred to as "Target Classifications," are as follows:

a. Analytical Tester
b. Area Storehouseman
c. Boiler Fireman
d. Boilermaker
e. Bricklayer
f. Carpenter
g. Clerical
h. Compounder No. 1
i. Craft Apprentice and Trainee
j. Dockman
k. Electrician
l. Garage Mechanic
m. Gas Dispatcher
n. Greasemaker No. 1
o. Greasemaker No. 2
p. Instrument Man
q. Insulator
r. Lineman
s. Machinist
t. Operator No. 1
u. Operator No. 2
v. Assistant Operator
w. Painter
x. Pipefitter
y. Power Plant Engineer No. 1
z. Power Plant Engineer No. 2

aa. Power Plant Operator
bb. Pumper No. 1
cc. Pumper No. 2
dd. Railroad Craft Group
ee. Receiving Room Man
ff. Treater No. 1
gg. Treater No. 2
hh. Tinner
ii. Treater Helper No. 1
jj. Troubleman
kk. Water Pumper No. 2
ll. Water Tender
mm. Water Treater No. 1
nn. Water Treating Plant Operator
oo. Welder
pp. EEO-1 Technician Category
qq. EEO-1 Professional Category
rr. EEO-1 Official and Manager Category

3. With respect to the Respondent implementing its Affirmative Action Program as provided herein, the Commission stipulates that:

   a. Ratios shall not be fixed but shall serve solely as general measures of the Respondent's satisfactory progress hereunder.

   b. Although it is assumed and expected that minority and female placement within the above listed "Target Classifications" will be evenly distributed, the Respondent will not be faulted if it fails to meet its goals and timetables in one or more classifications as long as its overall progress is satisfactory.

c. The Respondent shall not be restricted to selection of Group "C" Affected Class members in meeting its goals and timetables, but may, at its discretion, select other qualified Negro, Spanish Surnamed American or female employees, or recruit from outside its workforce, thereby equally satisfying Affirmative Action commitments.

d. Failure by the Respondent to meet its goals and timetables hereunder shall not serve as justification to increase or renegotiate backpay as provided in Section B.

4. Considering the above, the Respondent agrees to establish a goal to fill one of every five vacancies in "Target Classifications" other than its EEO-1 Official and Manager Category, wherein the ratio shall be one of every seven, with a Negro, a Spanish Surnamed American or a female until such time as their respective representation jointly within said classifications equals or exceeds their joint representation throughout the Respondent's workforce.

5. On occasions when a vacancy is to be filled with a Group "C" member, the Respondent will fill it by selecting the bidder having greatest seniority, subject to relative skills, abilities, and qualifications, and provided that the Respondent's initial entry requirements are met.

6. Group "C" members upgrading hereunder shall be classified as provisional and shall be on trial for a period not to exceed 120 days. They will receive the same training and orientation given other employees, and, if qualifying according to normal

company competency standards, the provisional title shall be dropped. The Respondent may make its determination prior to expiration of the full 120 day period. An employee determined by the Respondent not to be qualified for the job for which he or she has been on trial shall be returned to his or her former classification without loss of seniority. Determination that any employee has qualified hereunder shall not bind the Respondent to accept the employee for any other classification, but such employee shall be judged at each level in the same manner as other employees. An upgraded Group "C" member may disqualify himself or herself during the 120 day trial period and, in that event, shall be returned to his or her former classification with uninterrupted seniority.

7. Each upgraded Group "C" member shall have his or her seniority date determined by applicable collective bargaining agreement provisions, with the exception that in the event of a reduction in force or layoff, any Group "C" member who has upgraded to a Clerical classification or to a Classification represented by the United Transportation Union; the Bricklayers, Masons and Plasters International Union Local No. 13; the International Association of Machinists and Aerospace Workers, Port Arthur Lodge No. 823; or the International Brother of Electrical Workers, AFL-CIO, Local Union No. 390 shall have bumpback rights into the Operator Helper No. 2 pool or into the classification of Utility Helper or Laborer, according to his or her former seniority at the time upgraded. The

Respondent shall retain the right to select into which of the above three classifications the affected Group "C" member shall be placed. Each Group "C" member so displaced shall continue to hold rights to recall into his or her craft position from which displaced, as though he or she had not bumped back.

8. The Respondent agrees that the rate of pay for each upgraded Group "C" member shall be the higher of his or her permanent rate at the time upgraded or the appropriate new rate. This provision shall not apply in the event that a Group "C" member bids into a classification in which the top rate for the new line of progression is less than his or her former rate.

9. Each member of Group "C" who participates in this special program shall receive one bona fide opportunity to upgrade. Such opportunity shall be satisfied, and the employee's rights hereunder shall terminate, when the employee either (a) takes a job and qualifies therefor, (b) takes a job and fails to qualify or requests to return to his or her former job classification or (c) declines an offer to upgrade. Group "C" members who resign from employment with the Respondent shall have no further rights hereunder.

10. An upgraded employee's failure to qualify during the established trial period, or a declination of a job offer made to an employee by the Respondent, shall not satisfy that particular exercise of the Respondent's obligation under established ratios to-

ward goals and timetables, and such opportunity shall be extended to another individual.

11. Notwithstanding any of the foregoing, the Respondent shall not be required to place or retain any person in a job who does not have the skill, ability and qualifications to perform said job.

12. The United States Equal Employment Opportunity Commission and the Respondent remain in disagreement as to the Respondent's continued use of test battery results for employment and promotion purposes. However, in order to provide a means to resolve those matters held in dispute, the Commission agrees that the Respondent reserves the right to utilize test scores along with other job related criteria in assessing individual qualifications. In consideration therefore, the Respondent represents that it shall not rely upon test scores as justification for its failure to meet goals and timetables in any job classification.

D. AFFIRMATIVE ACTION

The Respondent agrees to refine and strengthen on a continuing basis positive and objective nondiscriminatory employment standards, procedures and practices and represents that in its business operations it exerts continuing effort to uniformly apply such standards, practices, and procedures in a manner which will assure equal employment opportunities in all aspects of its total work force and operations without regard to race, color, religion, sex or national origin.

E. COMMISSION ASSERTION AND REPORTING REQUIREMENTS

1. The Equal Employment Opportunity Commission agrees that upon fulfillment of its obligations hereunder the Respondent will be in full compliance with all provisions of Title VII of the Civil Rights Act of 1964, as amended, at its Port Arthur, Texas Refinery.

2. Six months after the date of approval of this Agreement and every six months thereafter for its established life of five years, the Respondent shall send to the Commission a written report concerning all actions encompassed by the provisions hereinabove set forth, Such reports shall accurately, fully and clearly describe the nature of the remedial and affirmative action undertaken and shall be submitted to the District Director, Equal Employment Opportunity Commission, 2320 LaBranch, Room 1101, Houston, Texas 77004 with a copy submitted to the Regional Manager, Office for Equal Opportunity, Department of the Interior, Denver Federal Center, Building 67, Room 880, Denver, Colorado 80225.

F. SIGNATURES

I have read the foregoing Conciliation Agreement and I accept and agree to the provisions contained herein:

4/14/76

MERLIN BREAUX
Gulf Oil Company—U.S.
Port Arthur, Texas
Respondent

I recommend approval of this Conciliation Agreement:

4/14/76 JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist (E)

I concur in the above recommendation for approval of this Conciliation Agreement:

4/14/76 CARL D. HANLEY
Supervisory Equal Opportunity Specialist (E)

Approved on behalf of the Commission:

4/14/76 HERBERT C. McCLEES
Herbert C. McClees
District Director

G. CERTIFICATE OF REVIEW AND APPROVAL

1. This is to certify on behalf of the Office of Equal Opportunity, United States Department of the Interior, review and approval of the foregoing conciliation agreement by and between the U. S. Equal Employment Opportunity Commission and Gulf Oil Company—U.S., Port Arthur, Texas.

2. It is agreed that the Respondent has complied with all of the provisions of the letter agreement between Edward E. Shelton, Director of Office for Equal Opportunity, United States Department of the Interior and L. R. Johnston, Vice President, Employee Relations, Gulf Oil Company—U.S. dated

May 7, 1971 and all points have been resolved to the complete satisfaction of the Office for Equal Opportunity, United States Department of the Interior with the single exception of a portion of paragraph 2e. "Free Bidding—Non-Related Jobs" in said agreement.

With regard to such paragraph, vacancies in the following jobs will be posted for bid to present employees in Group "B":

Checker	Wax Packaging House—Pump House 78 (Lubricating)
Checker	Drum Filling and Loading (Package and Grease)
Fire Assistant	Maintenance Division
Truck Driver	Maintenance Division
Bathhouse Attendant	Maintenance Division

3. Should a bidding employee in Group "B" be senior to the employee who would receive the job through normal promotional procedures, such employee should be awarded the job. In addition, should her present rate be greater than the posted job in question, she should retain her present rate and also should have the option of returning to her former position within a thirty-day period. Other members of the "affected class" shall not have such bidding rights.

4. The Office for Equal Opportunity, Department of the Interior agrees that upon fulfillment of its obligations hereunder the Respondent will be in full compliance with all provisions of Executive Order 11246, as amended, at its Port Arthur, Texas Refinery.

5. The Respondent recognizes that it has a continuing obligation for Affirmative Action under Executive Order 11246, as amended, and the implementing regulations of the Department of Labor.

4/14/76 GERALD C. WILLIAMS
Gerald C. Williams
Western Regional Manager

Reviewed:

4/14/76 JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist (E)

Approved on behalf of the United States Equal Employment Opportunity Commission:

4/14/76 LORENZO D. COLE
Lorenzo D. Cole
Deputy Director

EXHIBIT A—List of Employees (Omitted)

EXHIBIT B—List of Employees (Omitted)

EXHIBIT B

May 25, 1976

I am required to make the following statement by Gulf's Law Department. Since 6 individuals have filed a class action suit against Gulf Oil Corporation and the Union alleging discrimination exists at this plant and since you are a potential plaintiff in that suit, Gulf must suspend—pending the court's order—all further mailing of checks and all further contacts with you concerning the payment of money under the EEOC agreement. We regret this situation deeply; but due to the suit, we cannot proceed further until the court so orders.

Wm. G. DUCK
Wm. G. Duck

WGD/am

ORDER

[Caption Omitted in printing]

Filed May 28, 1976

Having considered the Motion by the Defendant, Gulf Oil Corporation, to limit communications with any potential or actual class member;

IT IS ORDERED that, in this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or any administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order shall be effective until Judge Fisher returns and can hear the matter upon formal motion.

Counsel for defendant, Gulf Oil Corporation, shall present a motion on this matter to Judge Fisher as soon as possible upon Judge Fisher's return.

Date: May 28, 1976

/s/ WILLIAM M. STEGER
United States District Judge

MOTION TO MODIFY ORDER

[Caption Omitted in Printing]

Filed June 8, 1976

Comes now Gulf Oil Corporation (Gulf), a Defendant in the above-styled case, and it moves this Court for an order modifying Judge Steger's Order dated May 28, 1976, and filed of record in this case on the same date, to allow Gulf to comply with the terms of the Conciliation Agreement dated April 14, 1976, and signed by Gulf, the Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior, by resuming under the Court's supervision the payment of back pay awards to employees covered by the Conciliation Agreement and obtaining from those employees receipts and releases all as provided for by the terms of the Conciliation Agreement. In support of this Motion, Gulf has attached a Memorandum of Points and Authorities.

[Signatures Omitted in Printing]

[Certificate of Service Omitted]

MEMORANDUM IN SUPPORT OF GULF OIL CORPORATION'S MOTION TO MODIFY ORDER

[Caption Omitted in Printing]

Filed June 8, 1976

This is a class action suit brought by six individual employees of Gulf's Port Arthur Refinery alleging that they have been victims of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and of the Civil Rights Act of 1866, 42 U.S.C. § 1981. The suit was filed on May 18, 1976, and Gulf was served with a summons on May 24, 1976.

Four days after the suit was filed and prior to the time Gulf was served with the summons in this case, attorneys for the Plaintiffs appeared at a meeting of approximately 75 actual or potential class members in Port Arthur and discussed with them the issues involved in the case and recommended to those employees that they support the present suit. In addition, it was reported to Gulf that Mr. Ulysses Gene Thibodeaux, an attorney for the Plaintiffs, recommended to those employees that they do not sign the receipt and release which had been mailed to the employees as a result of a Conciliation Agreement entered into by Gulf, the U.S. Equal Employment Opportunity Commission (EEOC) and the Office for Equal Opportunity, U.S. Department of the Interior (OEO). In fact, it is reported that Mr. Thibodeaux stated that even if the employee had signed the receipt and release, he should now return the check which had been mailed to the employee by Gulf.

As a result of this activity by the Plaintiffs' attorney, Gulf on May 28, 1976, filed a Motion to Limit Communications with any Potential or Actual Class Member and brought the Motion on for hearing before The Honorable William M. Steger. Judge Steger agreed to hear the matter in the absence of The Honorable Joe J. Fisher so that the status quo of the case could be preserved until Judge Fisher returned. After hearing argument of counsel for both the Plaintiffs and Defendant Gulf, Judge Steger entered an order which was made applicable to all parties and forbid all parties and their attorneys from communicating with actual or potential class members who were not formal parties to the action. In addition, Judge Steger ordered that the Defendant Gulf present a motion on this matter to Judge Fisher as soon as possible upon Judge Fisher's return. In order to comply with Judge Steger's order, Gulf has filed this Motion to Modify so that the matter may be heard by Judge Fisher.

The purpose of the Motion to Modify is to allow Gulf, the EEOC, and the OEO to proceed under the terms of a Conciliation Agreement dated April 14, 1976 (attached hereto as Exhibit A). The Conciliation Agreement which has been negotiated between Gulf and the Federal agencies over a period of eight years was an effort by Gulf to settle the very issues which now have been raised in this eleventh hour lawsuit. The Conciliation Agreement provided for an award of over $900,000 to 616 Negro employees and approximately 29 female employees at Gulf's Port Arthur Refinery.

As soon as the Conciliation Agreement was finalized, Gulf pursuant to the terms of the Agreement mailed a letter and release, the form of which was approved by

the Federal agencies, notifying all employees covered by the Agreement that they were entitled to an award of back pay and that upon execution of the receipt and release the employees would receive the back pay award. Between the time the Conciliation Agreement was executed by Gulf and the date the summons was served upon Gulf in this action, approximately 452 employees out of a total of 643 employees entitled to a back pay award under the Agreement had executed the receipt and release and had received their back pay checks.

So as to comply with the letter and spirit of Rule 23(a), F.R.C.P. and the Canons of Ethics of the Bar Association, Gulf immediately upon service of the summons suspended all further mailings to actual or potential class members and informed all actual or potential class members who called Gulf that no further communications concerning the Conciliation Agreement or the issues raised in the lawsuit could be discussed with them until the Court so orders. Attached hereto as Exhibit B is a copy of a statement which was read to all potential and actual class members who called Gulf inquiring about these matters. In accordance with Judge Steger's Order, Gulf has continued to suspend the payment of back pay awards and the acceptance of receipts and releases from employees who are actual or potential class members.

So that Gulf may fulfill the terms of the Conciliation Agreement, it has moved this Court for an order to modify Judge Steger's previous Order so that it may proceed to make the back pay awards pursuant to the terms of the Conciliation Agreement. It is felt that the rights of all parties will be fully protected if the Court exercises its judicial control over the procedures whereby

potential or actual class members not formal parties to this suit are contacted with regard to the terms of the Conciliation Agreement. In that regard, Gulf proposes that the Court order that the Clerk mail a letter to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back awards informing them that they have 45 days from the date of receipt of the letter to accept the offer of settlement as contained in the Conciliation Agreement and if such offer is not accepted within that time period, the offer will expire until further notice of the Court. Since the affected employees already have received notices informing them of the terms of the Conciliation Agreement and enclosing the receipt and release the Court's order setting a time limit for acceptance of the offer would now be appropriate. During the 45 day time period in which the actual or potential class members are deciding whether or not to accept the offer under the Conciliation Agreement the parties to this lawsuit and their counsel should be forbidden to contact those individuals so that they might make their own independent decision concerning the acceptance of the back pay award.

The two Federal agencies who have been involved with this matter for over eight years and who have protected the rights of the individual employees support Gulf's position that the terms of the Conciliation Agreement should be carried out by allowing Gulf to proceed with the payment of back pay awards. Mr. Herbert C. McClees, who is the District Director of the EEOC in Houston and whose office was involved with the negotiation of the Conciliation Agreement, states in his affidavit that

he believes the issues and relief sought by the Plaintiffs in this case are almost identical to the issues which were resolved under the terms of the Conciliation Agreement. In addition, he states that he feels that the Conciliation Agreement is a "fair, equitable, thorough and comprehensive solution to the charges that Gulf has discriminated at its Port Arthur Refinery in violation of Title VII of the Civil Rights Act of 1964" (see page 4 of Affidavit of Herbert C. McClees attached hereto as Exhibit C). Mr. Gerald C. Williams, Western Regional Manager of the OEO in Lakewood, Colorado, whose office was responsible for negotiating the Conciliation Agreement on behalf of the Department of the Interior, supports Mr. McClees' belief that Gulf should be allowed to continue to fulfill the terms of the Conciliation Agreement. (See Affidavit of Mr. Williams attached hereto as Exhibit D.)

Gulf's request to modify Judge Steger's Order to allow the payment of back pay awards under the Conciliation Agreement is consistent with the provisions of Rule 23(e) which states: "A class action shall not be dismissed or compromised without the approval of the Court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the Court directs." The Courts have been consistent in their ruling that a defendant in a class action suit may negotiate settlements with potential or actual class members who are not formal parties to the action. *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770 (2nd Cir. 1972). However, the courts have been anxious to protect the rights of unsophisticated potential class members by exercising judicial control over the manner in which settlement proposals are com-

municated to those class members. In *American Finance System, Inc., v. Harlow,* 65 F.R.D. 572 (D. Md. 1974) the court did allow precertification communications between the named parties and the prospective class members only within the strict limits delineated by a memorandum and order from the court. In that case, the court allowed the defendants to send a notice of proposed settlement to all potential class members and allowed the potential class members 35 days from the date of receipt of the order to accept or reject the proposed offer. However, all further communications other than those permitted by the notice between the named parties, their representatives or counsel and the potential class members were forbidden by the court. *Harlow, supra.* at 577. The plaintiffs in the *Harlow* case stated that such a limitation on communications was in violation of the First Amendment to the United States Constitution and would violate Rule 23(e) since a settlement by potential class members would have the effect of destroying the numerosity requirement under Rule 23(a). However, the court dismissed these arguments by saying:

> "Counterbalancing these considerations is the danger that the class action vehicle will be eviscerated by violators of the civil rights acts who are able to convince legally unsophisticated class members that their claims are unlikely to succeed. Even in *Weight Watchers,* a class not involving a civil rights act, the lower court required that counsel for each franchisee be present during the discussion and that counsel for the class representative be given five days notice of such negotiations, 55 F.R.D. 50 (1971). Given this judicial concern in the guidelines of the *Manual For Complex and Multidistrict Litigation,* the court will only permit AFS to send a

> neutrally worded notice of settlement containing no more than the terms of the proposed compromise, the position of both parties and a copy of this memorandum and order. If the potential class member affirmatively rejects the offer or fails to answer within 30 days, the court will assume that he wishes the action to proceed to judgment." *Harlow, supra.* at 576.

The instant case provides the maximum protection for unsophisticated class members since the two Federal agencies have been involved in detailed negotiations for a period of eight years in their attempts to settle the charges that Gulf has discriminated in violation of Title VII at its Port Arthur Refinery. Since the potential class members' rights have been protected by the Federal agencies, it is felt that the Court should allow Gulf to proceed with the payment of back pay awards to the potential class members.

Conclusion

In view of the above stated authorities, Gulf's Motion to Modify should be granted.

[Signatures Omitted in Printing]

CONCILIATION AGREEMENT

Exhibit A

[Caption Omitted in Printing]

* * *

A charge having been filed under Title VII of the Civil Rights Act of 1964, as amended, by a Commissioner of the U. S. Equal Employment Opportunity Commission against the Respondent, the charge having been investigated and reasonable cause having been found, the parties do resolve and conciliate this matter as follows:

[Table of Contents Omitted in Printing]

A. GENERAL PROVISIONS

1. It is understood that this Agreement does not constitute an admission by the Respondent of any violation of Title VII of the Civil Rights Act of 1964, as amended.

2. The U. S. Equal Employment Opportunity Commission hereby waives and releases its cause of action against the Respondent under the instant charge and covenants not to sue the Respondent independently or on behalf of any individual including, but not necessarily limited to, persons listed on Attachments "A" and "B" hereto with respect to any matter alleged thereunder, subject to performance by the Respondent of the promises and representations contained herein.

3. The Respondent understands that the Commission, on its own motion, may review compliance with this Agreement. As a part of such review, the Commission may require written reports concerning compliance, may inspect the premises, examine witnesses, and examine and copy documents pertinent to such review. The Commission agrees that the Respondent reserves all rights and protection afforded by the Freedom of Information Act, as amended.

4. The Respondent reaffirms that all of its hiring, promotion practices, classification, assignments, layoffs and all other terms and conditions of employment shall be maintained and conducted in a manner which does not discriminate on the basis of race, color, religion, sex or national origin in violation of Title VII of the Civil Rights Act of 1964, as amended.

5. The Respondent agrees that it will not knowingly practice nor permit its supervisory or other personnel to practice discrimination or retaliation of any kind against any person because of his or her opposition to any practice declared unlawful under Title VII of the Civil Rights Act of 1964, as amended, or because of the filing of a charge, or giving of testimony or assistance, or participation in any manner in any investigation, proceeding, or hearing under Title VII of the Civil Rights Act of 1964, as amended.

6. Recognizing the exception with respect to sex as regards toilets, showers and the like, the Respondent reaffirms that all facilities on the premises or furnished its employees, including recreational op-

portunities and all other conveniences and services, are available for the use and enjoyment of any employee without regard to race, color, religion, sex or national origin; that there is no discrimination against any employee on said grounds with respect to the use of facilities; and that the notices required to be posted by Title VII of the Civil Rights Act of 1964, as amended, are posted.

B. SETTLEMENT AGREMENT—BACK PAY

1. Appertaining to back pay, the Affected Class is hereby defined as all Negroes employed by the Respondent on July 2, 1965, whose seniority date antecedes January 1, 1957, and all hourly rated females employed by the Respondent in its Package and Grease Department on July 2, 1965.

2. The Commission agrees that a thorough search has been made to identify all individuals potentially entitled to backpay under this Agreement, that the Respondent's personnel records since the effective date of Title VII of the Civil Rights Act of 1964 have been exhaustively analyzed and that, through examination of documents submitted by the Respondent, no persons potentially entitled other than those listed on Attachments "A" and "B" hereto could be found.

3. For the sake of convenience, the Affected Classes, as shown on Attachments "A" and "B", shall be designated and hereinafter referred to as Group "A" and Group "B" respectively.

4. The Respondent agrees that all individuals identified as belonging to Group "A" or Group "B"

shall immediately be awarded upon notification of acceptance as described below, such back pay as is hereinafter provided:

a. The Respondent represents that it has set aside a sum for purposes of fulfilling all back pay obligations which are or might have been incurred as a result of employment practices complained of in the instant charge or which were treated in the Commission's Letters of Determination or Reconsideration of Determination thereon, including matters found by the Commission to be like and related.

b. The United States Equal Employment Opportunity Commission concurs that the sum set aside is sufficient to meet the purposes of providing equitable relief to designated members of Group "A" or Group "B" and stipulates that $35,000.00 of said amount may be reserved and held in a special account by the Respondent for a period of five years. The Commission agrees that, insofar as matters encompassed by this Agreement are raised to issue in the future, the Respondent shall utilize its special account to dispose of contingent liabilities, and that any undispensed funds remaining, after passage of the account's established five year life, shall be returned to the Respondent's general control for unrestricted use.

c. In formulating the specific relief due each individual hereunder credits will be awarded as follows:

(1) To members of Group "A", $5.62 for each month of continuous service with the Re-

spondent prior to January 1, 1957, and $2.81 for each month of continuous service thereafter until date of termination or until January 1, 1971, whichever occurs earlier.

(2) To members of Group "B", $5.62 for each month of continuous service with the Respondent until date of termination or until January 1, 1975, whichever occurs earlier.

d. Back pay awards previously tendered to members of Group "A" under the Respondent's Agreement dated May 7, 1971, with the Office for Equal Opportunity, United States Department of the Interior shall be deducted from amounts hereunder due those same individuals.

e. Back pay awards will be subject to standard deductions for F.I.C.A. and Federal Income Tax Withholding.

f. Upon accepting a back pay award, each Group "A" or Group "B" member will be required to execute a general release to the Respondent for any and all claims against the Respondent as a result of events arising from its employment practices occurring on or before the date of release, or which might arise as the result of the future effects of past or present employment practices.

g. Prior to tendering back pay awards, the Respondent agrees to notify in writing each member belonging to Group "A" or Group "B" that he or she has been so identified, and of the general formula used to calculate awards and of the conditions of waiver or release required in ac-

cepting back pay. Each member shall be furnished a form on which to notify the Respondent, within thirty days, whether such member desires to accept or decline back pay consideration. A failure on the part of any member to respond within thirty days shall be interpreted as acceptance of back pay. It is agreed that the form of notification to be utilized shall be reviewed and signed by a Commission representative prior to being implemented or disseminated.

h. In the event that a member of Group "A" or Group "B" is deceased, notice shall be given and payment made to his or her estate. Upon accepting a back pay award, the deceased member's heir or heirs shall be required to execute a general release as is provided in subsection (f) hereinabove.

i. In the event that a member of Group "A" or Group "B" refuses his or her award, or cannot be located or, if deceased, his heir or heirs cannot be located through the exercise of reasonable effort, his or her back pay award shall be placed in the Respondent's special account, as provided in subsection (b) above, to be returned to the Respondent's general control, if unclaimed upon expiration of the account's life.

C. SETTLEMENT AGREEMENT—GOALS AND TIMETABLES

1. a. For Affirmative Action purposes, the Affected Class is hereby defined as all hourly rated females presently employed in the Respondent's

Package and Grease Department whose seniority date antecedes April 5, 1974 and all members of back pay Group "A" who are presently employed in the classification of Operator Helper No. 1; Boiler Washer "X", Brander "X", Operator Helper No. 2, Utility Helper or Laborer.

b. For the sake of convenience, the Affected Class for Affirmative Action purposes shall be designated and hereinafter referred to as Group "C".

2. The Respondent, firm in its commitment to act in good faith and compliance with Title VII of the Civil Rights Act of 1964, as amended, has conducted a thorough analysis of its work force and has, as of January 1, 1976, identified those classifications wherein Negroes, Spanish Surnamed Americans and/or females are statistically underrepresented. Said classifications, designated and hereinafter referred to as "Target Classifications," are as follows:

   a. Analytical Tester
   b. Area Storehouseman
   c. Boiler Fireman
   d. Boilermaker
   e. Bricklayer
   f. Carpenter
   g. Clerical
   h. Compounder No. 1
   i. Craft Appentice and Trainee
   j. Dockman
   k. Electrician
   l. Garage Mechanic
   m. Gas Dispatcher
   n. Greasemaker No. 1

o. Greasemaker No. 2
p. Instrument Man
q. Insulator
r. Lineman
s. Machinist
t. Operator No. 1
u. Operator No. 2
v. Assistant Operator
w. Painter
x. Pipefitter
y. Power Plant Engineer No. 1
z. Power Plant Engineer No. 2
aa. Power Plant Operator
bb. Pumper No. 1
cc. Pumper No. 2
dd. Railroad Craft Group
ee. Receiving Room Man
ff. Treater No. 1
gg. Treater No. 2
hh. Tinner
ii. Treater Helper No. 1
jj. Troubleman
kk. Water Pumper No. 2
ll. Water Tender
mm. Water Treater No. 1
nn. Water Treating Plant Operator
oo. Welder
pp. EEO-1 Technician Category
qq. EEO-1 Professional Category
rr. EEO-1 Official and Manager Category

3. With respect to the Respondent implementing its Affirmative Action Program as provided herein, the Commission stipulates that:

a. Ratios shall not be fixed but shall serve solely as general measures of the Respondent's satisfactory progress hereunder.

b. Although it is assumed and expected that minority and female placement within the above listed "Target Classifications" will be evenly distributed the Respondent will not be faulted if it fails to meet its goals and timetables in one or more classifications as long as its overall progress is satisfactory.

c. The Respondent shall not restricted to selection of Group "C" Affected Class members in meeting its goals and timetables, but may, at its discretion, select other qualified Negro, Spanish Surnamed American or female employees, or recruit from outside its workforce, thereby equally satisfying Affirmative Action commitments.

d. Failure by the Respondent to meet its goals and timetables hereunder shall not serve as justification to increase or renegotiate backpay as provided in Section B.

4. Considering the above, the Respondent agrees to establish a goal to fill one of every five vacancies in "Target Classifications" other than its EEO-1 Official and Manager Category, wherein the ratio shall be one of every seven, with a Negro, a Spanish Surnamed American or a female until such time as their respective representation jointly within said classifications equals or exceeds their joint representation throughout the Respondent's workforce.

5. On occasions when a vacancy is to be filled with a Group "C" member, the Respondent will fill it by

selecting the bidder having greatest seniority, subject to relative skills, abilities, and qualifications, and provided that the Respondent's initial entry requirements are met.

6. Group "C" members upgrading hereunder shall be classified as provisional and shall be on trial for a period not to exceed 120 days. They will receive the same training and orientation given other employees, and, if qualifying according to normal company competency standards, the provisional title shall be dropped. The Respondent may make its determination prior to expiration of the full 120 day period. An employee determined by the Respondent not to be qualified for the job for which he or she has been on trial shall be returned to his or her former classification without loss of seniority. Determination that any employee has qualified hereunder shall not bind the Respondent to accept the employee for any other classification, but such employee shall be judged at each level in the same manner as other employees. An upgraded Group "C" member may disqualify himself or herself during the 120 day trial period and, in that event, shall be returned to his or her former classification with uninterrupted seniority.

7. Each upgraded Group "C" member shall have his or her seniority date determined by applicable collective bargaining agreement provisions, with the exception that in the event of a reduction in force or layoff, any Group "C" member who has upgraded to a Clerical classification or to a classification represented by the United Transportation Union; the Bricklayer, Mason and Plasters Inter-

national Union Local No. 13; the International Association of Machinists and Aerospace Workers, Port Arthur Lodge No. 823; or the International Brother of Electrical Workers, AFL-CIO, Local Union No. 390 shall have bumpback rights into the Operator Helper No. 2 pool or into the classification of Utility Helper or Laborer, according to his or her former seniority at the time upgraded. The Respondent shall retain the right to select into which of the above three classifications the affected Group "C" member shall be placed. Each Group "C" member so displaced shall continue to hold rights to recall into his or her craft position from which displaced, as though he or she had not bumped back.

8. The Respondent agrees that the rate of pay for each upgraded Group "C" member shall be the higher of his or her permanent rate at the time upgraded or the appropriate new rate. This provision shall not apply in the event that a Group "C" member bids into a classification in which the top rate for the new line of progression is less than his or her former rate.

9. Each member of Group "C" who participates in this special program shall receive one bona fide opportunity to upgrade. Such opportunity shall be satisfied, and the employee's rights hereunder shall terminate, when the employee either (a) takes a job and qualifies therefor, (b) takes a job and fails to qualify or requests to return to his or her former job classification or (c) declines an offer to upgrade. Group "C" members who resign from em-

ployment with the Respondent shall have no further rights hereunder.

10. An upgraded employee's failure to qualify during the established trial period, or a declination of a job offer made to an employee by the Respondent, shall not satisfy that particular exercise of the Respondent's obligation under established ratios toward goals and timetables, and such opportunity shall be extended to another individual.

11. Notwithstanding any of the foregoing, the Respondent shall not be required to place or retain any person in a job who does not have the skill, ability and qualifications to perform said job.

12. The United States Equal Employment Opportunity Commission and the Respondent remain in disagreement as to the Respondent's continued use of test battery results for employment and promotion purposes. However, in order to provide a means to resolve those matters held in dispute, the Commission agrees that the Respondent reserves the right to utilize test scores along with other job related criteria in assessing individual qualifications. In consideration therefore, the Respondent represents that it shall not rely upon test scores as justification for its failure to meet goals and timetables in any job classification.

D. AFFIRMATIVE ACTION

The Respondent agrees to refine and strengthen on a continuing basis positive and objective nondiscriminatory employment standards, procedures and practices and represents that in its business operations it exerts continu-

ing effort to uniformly apply such standards, practices, and procedures in a manner which will assure equal employment opportunities in all aspects of its total work force and operations without regard to race, color, religion, sex or national origin.

E. COMMISSION ASSERTION AND REPORTING REQUIREMENTS

1. The Equal Employment Opportunity Commission agrees that upon fulfillment of its obligations hereunder the Respondent will be in full compliance with all provisions of Title VII of the Civil Rights Act of 1964, as amended, at its Port Arthur, Texas Refinery.

2. Six months after the date of approval of this Agreement and every six months thereafter for its established life of five years, the Respondent shall send to the Commission a written report concerning all actions encompassed by the provisions hereinabove set forth.

   Such reports shall accurately, fully and clearly describe the nature of the remedial and affirmative action undertaken and shall be submitted to the District Director, Equal Employment Opportunity Commission, 2320 LaBranch, Room 1101, Houston, Texas 77004 with a copy submitted to the Regional Manager, Office for Equal Opportunity, Department of the Interior, Denver Federal Center, Building 67, Room 880, Denver, Colorado 80225.

F. SIGNATURES

I have read the foregoing Conciliation Agreement and I accept and agree to the provisions contained herein:

4/14/76 MERLIN BREAUX
Gulf Oil Company—U. S.
Port Arthur, Texas
Respondent

I recommend approval of this Conciliation Agreement:

4/14/76 JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist (E)

I concur in the above recommendation for approval of this Conciliation Agreement:

4/14/76 CARL D. HANLEY
Supervisory Equal Opportunity
Specialist (E)

Approved on behalf of the Commission:

4/14/76 HERBERT C. McCLEES
Herbert C. McClees
District Director

G. CERTIFICATE OF REVIEW AND APPROVAL

1. This is to certify on behalf of the Office of Equal Opportunity, United States Department of the Interior, review and approval of the foregoing conciliation agreement by and between the U.S. Equal Employment Opportunity Commission and Gulf Oil Company—U. S., Port Arthur, Texas.

2. It is agreed that the Respondent has complied with all of the provisions of the letter agreement between Edward E. Shelton, Director of Office for Equal

Opportunity, United States Department of the Interior and L. R. Johnston, Vice President, Employee Relations, Gulf Oil Company—U. S. dated May 7, 1971 and all points have been resolved to the complete satisfaction of the Office for Equal Opportunity, United States Department of the Interior with the single exception of a portion of paragraph 2 e. "Free Bidding—Non-Related Jobs" in said agreement.

With regard to such paragraph, vacancies in the following jobs will be posted for bid to present employees in Group "B":

Checker	Wax Packing House— Pump House 78 (Lubricating)
Checker	Drum Filling and Loading (Package and Grease)
Fire Assistant	Maintainance Division
Truck Driver	Maintainance Division
Bathhouse Attendant	Maintainance Division

3. Should a bidding employee in Group "B" be senior to the employee who would receive the job through normal promotional procedures, such employee should be awarded the job. In addition, should her present rate be greater than the posted job in question, she should retain her present rate and also should have the option of returning to her former position within a thirty-day period. Other members of the "affected class" shall not have such bidding rights.

4. The Office for Equal Opportunity, Department of the Interior agrees that upon fulfillment of its obligations hereunder the Respondent will be in full compliance with all provisions of Executive Order 11246, as amended, at its Port Arthur, Texas Refinery.

5. The Respondent recognizes that it has a continuing obligation for Affirmative Action under Executive Order 11246, as amended, and the implementing regulations of the Department of Labor.

4/14/76

G. C. WILLIAMS
Gerald C. Williams
Western Regional Manager

Reviewed:

4/14/76

JAMES R. ANDERSON
James R. Anderson
Equal Opportunity Specialist (E)

Approved on behalf of the United States Equal Employment Opportunity Commission:

4/14/76

LORENZO D. COLE
Lorenzo D. Cole
Deputy Director

[Exhibit A—List of Employees (Omitted)]

[Exhibit B—List of Employees (Omitted)]

Exhibit B

May 25, 1976

I am required to make the following statement by Gulf's Law Department. Since 6 individuals have filed a class action suit against Gulf Oil Corporation and the Union alleging discrimination exists at this plant and since you are a potential plaintiff in that suit, Gulf must suspend—pending the court's order—all further mailing of checks and all further contacts with you concerning the payment of money under the EEOC agreement. We regret this situation deeply; but due to the suit, we cannot proceed further until the court so orders.

Wm. G. DUCK
Wm. G. Duck

WGD/am

Exhibit C

AFFIDAVIT OF HERBERT C. McCLEES

[Caption Omitted in Printing]

STATE OF TEXAS
COUNTY OF HARRIS

Herbert C. McClees, being duly sworn, deposes and says:

1. I am an employee of the United States Equal Employment Opportunity Commission (hereinafter referred to as "the EEOC") and am located in Houston, Texas where the Commission maintains its Houston District Office. I have worked for the Commission for eight years and presently hold the position of District Director.

2. In my position as District Director, I am charged with directing all activities of the Commission for the twenty-six county area surrounding Houston, Texas, including the counties of Jefferson and Orange. Within this geographic area I have the authority, as vested in me by the EEOC, to investigate charges which have been filed against individuals under Title VII of the Civil Rights Act of 1964, as amended. In addition, I have the authority to enter into a Conciliation Agreement settling the charges against the individual when the facts and circumstances of a particular case so dictates. In most cases, after a charge has been filed with the EEOC an employee under my direction and supervision investigates the charge to determine whether or not reasonable cause exists to believe that the act has been violated. If the in-

vestigator finds reasonable cause to believe the act has been violated, the EEOC attempts to settle all differences by entering into a Conciliation Agreement which in some cases will provide for an award of back pay to the affected employees and an affirmative action program to ensure continued compliance with Title VII.

3. I have read and am familiar with the Complaint which has been filed in the United States District Court for the Eastern District of Texas, Beaumont Division, styled: *Wesley P. Bernard, et al v. Gulf Oil Company, et al,* Civil Action No. B-76-183-CA (hereinafter referred to as "the suit"). The Complaint was brought by six employees of Gulf Oil Corporation (hereinafter referred to as "Gulf") at its Port Arthur Refinery against Gulf and the Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23. In their complaint these individuals have alleged that Gulf and the Union have discriminated against them in violation of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866. Of the six employees who filed this action, three have filed charges with the EEOC, while three have failed to file charges with the EEOC. Of the three employees who have filed charges, two have requested right to sue letters be issued, which requests are presently being processed. The issues raised in the Complaint are almost identical to those issues which were investigated by the EEOC and which were the subject of a Conciliation Agreement signed April 14, 1976 by Gulf, the EEOC and the Office for Equal Opportunity, U. S. Department of Interior (OEO). The Conciliation Agreement specifically provides that the Agreement does not constitute an admission by Gulf of any violation of Title VII of the Civil Rights Act of 1964, as amended.

4. The charges which have been raised in the suit have been the subject of an EEOC investigation which has been conducted over the past eight years. During this time interval, the EEOC, among other things, interviewed employees of Gulf at its Port Arthur Refinery; examined all relevant documents and business records of Gulf; conducted on-site investigations at Gulf's Port Arthur Refinery; and held numerous meetings with Gulf's executives. It is my opinion that this investigation was extremely thorough and comprehensive since it covered all Negro employees employed by Gulf on July 2, 1965, whose seniority date antecedes January 1, 1957 (the defined affected class of Negro employees in the Conciliation Agreement). In order to identify this "affected class" the EEOC conducted a thorough search in order to identify all individuals potentially entitled to back pay under the Conciliation Agreement. The personnel records of all affected employees retained by Gulf since the effective date of Title VII of the Civil Rights Act of 1964 were exhaustively analyzed by the EEOC and no persons potentially entitled to a back pay award could be found other than those listed on Attachments "A" and "B" attached to the Conciliation Agreement. In addition to the award of back pay, the Conciliation Agreement provided for an affirmative action program where specific goals and timetables were set mandating that Gulf recruit hire, and promote minorities. In order to ensure that Gulf complies with the terms of the Conciliation Agreement, including awarding back pay to the affected class and complying with the affirmative action goals and timetables, Gulf must report to the EEOC every six months for a period of five years its progress in conforming to the provisions of the Conciliation Agreement. I have read

the prayer for relief in the Plaintiffs' Complaint and it is my opinion that the relief which the EEOC has obtained by way of the Conciliation Agreement provides the same kind of relief which the Plaintiffs seek in their suit.

6. Under the Conciliation Agreement, Gulf was required to notify in writing each member of the affected class that he or she was entitled to an award of back pay and of the conditions of waiver or release required in accepting such an award. The Agreement provided that each member of the affected class shall be furnished a form on which to notify Gulf, within 30 days, whether such member desires to accept or decline the back pay consideration. A failure on the part of any member to respond within the 30 days would be interpreted as an acceptance of back pay under terms of the Agreement. The EEOC approved the form of letter and release which was sent to each member of the affected class. The Conciliation Agreement provides that upon fulfillment of the obligation thereunder, Gulf would be in full compliance with all provisions of Title VII of the Civil Rights Act of 1964, as amended, at its Port Arthur Refinery.

7. Gulf commenced mailings under terms of the Agreement approximately three weeks prior to the filing of the suit. Up until the time that Gulf was served with a summons in the suit, it had complied faithfully and fully with all terms of the Conciliation Agreement and approximately 431 Negro employees out of a total of 616 Negro employees entitled to a back pay award had signed releases and received their back pay award. However, Gulf notified the EEOC on the date it was served with a summons in the suit that they could no longer continue to fulfill certain provisions of the Conciliation Agreement

until the Court allowed further contact with potential or actual class members to the suit.

8. So that the employees may receive their back pay awards it is my opinion that Gulf should now be allowed to proceed with completing the back pay awards and receiving releases under the terms of the Conciliation Agreement since that Agreement is a fair, equitable, thorough and comprehensive solution to the charges that Gulf has discriminated at its Port Arthur Refinery in violation of Title VII of the Civil Rights Act of 1964.

HERBERT C. McCLEES
Herbert C. McClees
District Director
Houston District Office
United States Equal Employment
Opportunity Commission

Subscribed and sworn to before me
this 3rd day of June, 1976.

BETTY L. DEFFERARI
Notary Public in and for
Harris County, Texas

My Commission Expires June 1, 1977

Exhibit D

AFFIDAVIT OF GERALD C. WILLIAMS

[Caption Omitted in Printing]

STATE OF COLORADO)
)ss
COUNTY OF JEFFERSON)

I, Gerald C. Williams, being duly sworn, depose and say

1. I am an employee of the Office for Equal Opportunity, U. S. Department of the Interior, hereinafter referred to as the OEO, and am located in Lakewood, Colorado, where the OEO maintains its Regional offices. I have worked for the OEO for five years in the position of Western Regional Manager.

2. In my position as Western Regional Manager, I am charged with directing all activties of the OEO for all assigned industries with facilities located in states west of the Mississippi River but including all of the State of Louisiana. Within this geographic area I have the authority, as vested in me by the OEO, to initiate investigations to determine whether or not government contractors or subcontractors are in compliance with Executive Order 11246, as amended, and the implementing regulations of the Department of Labor, 41 CFR 60. In this regard, when there are issues which violate both the Executive Order and Title VII of the Civil Rights Act of 1964, an attempt is made to coordinate with the United States Equal Employment Opportunity Commission, hereinafter referred to as the EEOC, investigations relating to acts of discrimination prohibited by law. I

have the authority to enter into concilation agreements or to approve conciliation agreements which have been entered into with government contractors or subcontractors in cases where reasonable cause exists to believe that their activities are outside of the provisions of Executive Order 11246. In most cases, where the OEO believes that a government contractor or subcontractor is acting outside of the provisions of Executive Order 11246 an employee under my direction and supervision investigates the charge to determine whether or not reasonable cause exists to believe that the Executive Order has been violated. If the investigator finds reasonable cause to believe that the Executive Order has been violated, the OEO attempts to settle all differences by entering into an agreement which in some cases will provide for an award of backpay to the affected employees and an Affirmative Action Program to compel the government contractor or subcontractor to comply with the provisions of the Executive Order.

3. I have read and am familiar with the complaint which has been filed in the United States District Court for the Eastern District of Texas, Beaumont Division, styled: *Wesley P. Bernard, Et Al v. Gulf Oil Company, Et Al,* Civil Action No. B-76-183-CA, hereinafter referred to as the suit. The complaint was brought by six employees of Gulf Oil Corporation, hereinafter referred to as Gulf, at its Port Arthur Refinery against Gulf Oil Company and the Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23. In their complaint these individuals have alleged that Gulf and the Union have discriminated against them in violation of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866. The issues were the subject of a conciliation

agreement signed April 14, 1976, by representatives of Gulf, the EEOC and the OEO. The charges which have been raised in the suit have been the subject of an OEO investigation which has been conducted over the past several years. Issues which have been raised in the suit have been investigated by the OEO which, among other things, interviewed employees of Gulf at its Port Arthur Refinery, examined all relevant documents and business records of Gulf, conducted on-site investigations at Gulf's Port Arthur Refinery, and held numerous meetings with Gulf's executives. It is my opinion that this investigation was thorough and comprehensive. It covered all Negro employees employed by Gulf on July 2, 1965, whose seniority date antecedes January 1, 1957, the defined affected class of Negro employees in the conciliation agreement.

4. After the major terms of the conciliation agreement had been settled between Gulf and the EEOC, those groups met with representatives of the OEO to discuss further actions required by Gulf in order to be in compliance with Executive Order 11246. As a result of this meeting, a Certificate of Review and Approval was attached to the conciliation agreement as Page 11 and 12 thereto which certified that upon completing certain affirmative action requirements with regard to employment, Gulf would be in full compliance with all of the provisions of Executive Order 11246, as amended, at its Port Arthur Refinery.

5. It is my opinion that the conciliation agreement as entered into between Gulf, the EEOC and the OEO is a fair and reasonable settlement of all charges that Gulf has discriminated against its affected class employees at

its Port Arthur Refinery. In addition, I have no objection to allowing Gulf to pursue fulfillment of the terms of the aforesaid conciliation agreement, including the payment of backpay awards and obtaining the releases of those affected class members who wish to participate in this settlement.

G. C. WILLIAMS

Subscribed and Sworn to before me
this 4th Day of June 1976.

EIDAN A. BROWN
Notary Public in and for
Jefferson County

My Commission expires Aug. 14, 1976

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT GULF OIL COMPANY'S MOTION TO LIMIT COMMUNICATIONS WITH ANY POTENTIAL OR ACTUAL CLASS MEMBER

[Caption Omitted in Printing]

Filed June 10, 1976

I.

Preliminary Statement

This action is instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e *et seq.* and 42 U.S.C. § 1981. The Complaint, filed on May 18, 1976, alleges a class action on behalf of: (a) all black employees employed by defendant Gulf Oil Company's Refinery of Port Arthur, Texas; (b) all black employees formerly employed by the defendant in Port Arthur, Texas; and (c) all black applicants for employment at Gulf Oil Company who have been rejected for employment at said Company.

II.

Statement of Facts

The issues stated below arise from an order issued by the Honorable William M. Steger on May 28, 1976, limiting communications with any potential or actual class member. This order, attached to this memorandum as Exhibit A, was issued pursuant to a Motion By Gulf To Limit Communications With Any Potential Or Actual Class Member filed on May 27, 1976, and is effective until the Honorable Joe J. Fisher can hear the matter upon formal motion.

As a result of the prohibitions contained in the May 28, 1976 order, plaintiffs' attorneys have been forbidden to communicate, directly or indirectly, with any members of the plaintiffs' class except for the six named plaintiffs to the lawsuit.

One of the attorneys for the plaintiffs is Charles E. Cotton of the New Orleans, Louisiana law firm of Cotton, Jones & Dennis. Another is Stella M. Morrison, a Port Arthur, Texas attorney of the law firm of Morrison, Floyd & Morrison. Associated with them in this instant action are several attorneys employed by the N.A.A.C.P. Legal Defense and Educational Fund, Inc., a non-profit corporation engaged in furnishing legal assistance in cases involving claims of racial discrimination. The Legal Defense Fund, which is entirely separate and apart from the National Association for the Advancement of Colored People (N.A.A.C.P.), has been approved by a New York court to function as a legal aid organization. Since 1940, the Legal Defense Fund has furnished legal assistance in civil rights matters in state and federal courts throughout the nation, usually in conjunction with local counsel such as Mr. Cotton and Ms. Morrison in this matter. See *N.A.A.C.P. v. Button,* 371 U.S. 415, 421, n. 5 (1963).[1]

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1. Mr. Barry L. Goldstein, LDF staff attorney, has developed considerable expertise in cases involving employment discrimination. He has been involved in several key precedent setting cases, among which have been *Rodgers v. United States Steel Corporation,* 508 F.2d 152, (3rd Cir.), *cert. denied,* 420 U.S. 969 (1975); *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975); *Franks v. Bowman Transportation Co.,* 47 L.Ed.2d 444 (1976); *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974); *Gamble v. Birmingham Southern Railroad Co.,* 514 F.2d 678 (5th Cir. 1975); *Ford v. United States Steel Corporation,* 520 F.2d 1043 (5th Cir. 1975). Mr. Ulysses G. Thibodeaux, Earl Warren Fellow with the Legal Defense Fund, has been trained in civil rights litigation by the Legal Defense Fund. His area of concentration has been in fair

In undertaking to represent the named plaintiffs, plaintiffs' attorneys did not accept or expect any compensation from them, nor do they expect to receive any compensation from any additional named plaintiffs who may hereafter be added, or from any member of the plaintiff class. Mr. Cotton and Ms. Morrison expect to be compensated only by such attorneys' fees as may eventually be awarded by the court. The fees collected for work done by the employees of the Legal Defense Fund will be paid over to that non-profit corporation and will not be paid to the individual staff lawyers. Plaintiffs' entitlement to an award of counsel fees by the court would not be affected by the number of individuals named as parties plaintiff since the fees are not paid by the clients but, rather, they are taxed as costs to the defendant. See 42 U.S.C. § 2000e-5(k).

III.

Statement of Issues Presented

1. Whether the district court is possessed of the authority to grant an order restricting communications with any potential or actual class member.

2. Whether an order of a district court restricting communications with any potential or actual class member is unconstitutional in violation of the First Amendment protections of freedom of speech, freedom of association, and privacy of association and the Due Process Clause of the Fifth Amendment.

3. Whether an order of a district court restricting communications with class members is unconstitutional

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employment litigation. Mr. Charles E. Cotton has developed considerable expertise in general civil rights litigation, but more particularly in fair employment litigation. Ms. Stella Morrison, prior to entering private practice, was associated with the Equal Employment Opportunity Commission.

on its face and as applied in that the order overbroadly infringes on constitutionally protected activities.

IV.

ARGUMENT

A district court can adopt rules governing the administration of laws before it. Those rules, however, must be consistent with the letter and spirit of the federal rules of Civil Procedure and with the Acts of Congress. *Rodgers v. United States Steel Corporation,* 508 F.2d 152 (3rd Cir.), *cert. denied,* 420 U.S. 969 (1975); 28 U.S.C. § 2071. In *Rodgers,* the Court was confronted with a district court order limiting communications with potential members of a class by the plaintiffs or their attorneys pursuant to a local rule of the district court.[2] In granting the plaintiffs a writ of mandamus, the Third Circuit specifically held that the district court was not empowered by Congress under Rule 3 of the Federal Rules of Civil Procedure[3] or 28 U.S.C. § 2071[4] to limit

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2. Local Rule 34(d) of the District Court for the Western District of Pennsylvania stated:

> No communication concerning such action (class action) shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an order may be entered by the Court approving the communication.

3. Rule 83, Fed. R. Civ. reads in pertinent part:

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

4. 28 U.S.C. § 2071 reads:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business, such rules shall be consistent with acts of congress and rules of practice and procedure prescribed by the Supreme Court.

communications between plaintiffs, or their attorneys, and third parties when such communication sought to encourage common participation in a class action lawsuit. A district court could not issue an order pursuant to a rule such as Local Rule 34(d) prior to class action certification.

The local rule in *Rodgers, supra,* was promulgated pursuant to Rule No. 7 suggested by the *Manual For Complex Litigation,* the very same suggested rule being relief on by the defendant in this instant action. *Rodgers* suggested that the panel which drafted the *Manual* "went too far in its apparent assumption that [a district court had] unreviewable discretion . . . to impose a prior restraint on communication or association," and that "the panel had no power to enlarge the statutory rule making authority of the district courts". 508 F.2d at 165.

Rodgers recognized that important constitutional rights of freedom of speech and association were involved in a rule limiting communications with class members, but declined to decide the constitutional issues. However, in another aspect of this litigation, the District Court for the Western District of Pennsylvania issued protective orders prohibiting disclosure of information contained in a deposition and placing a memorandum under impoundment. The plaintiffs' petition for a writ of mandamus was granted based on a finding that the judge's orders were unconstitutional. Because the orders constituted a prior restraint on petitioners' counsel's freedom of speech in violation of the First Amendment, the district court was not acting within the "proper sphere of its lawful power". *Rodgers v. United States Steel Corporation and Honorable Hubert I. Ieitelbaum,* No. 76-1340 (3rd Cir., June 3, 1976). A copy of that decision is attached as Exhibit B.

Standing alone, the opinions in *Rodgers v. United States Steel Corporation* are sufficiently compelling authorities to permit denied of defendant's motion. The significant constitutional questions involved which result from an order limiting communications with class members, however, merit further discussion. The Supreme Court has specifically addressed the question and ruled that an order limiting communications would infringe upon constitutionally protected collective activity by civil rights advocates. See *NAACP v. Button,* 371 U.S. 415 (1963). An order prohibiting communications and associations with members of a group seeking legal redress for civil rights violations is constitutionally impermissible:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences, it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. . . .
>
> The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, *association for litigation may be the most effective form of political association.* 371 U.S. at 429, 431 (emphasis added).

Following *NAACP v. Button* several cases concerning injunctive restraints on "solicitation" which were far more narrow than the order sought by the defendant in this case held such restraints unconstitutional. See, *Brother-*

hood of Railroad Trainmen v. Virginia ex rel State Bar, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971). "The common thread running through our decision in *NAACP v. Button, Trainmen,* and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a federal right within the protection of the First Amendment." *United Transportation Union, supra,* 401 U.S. at 585.

The defendant's memorandum states on page 3 that communications between plaintiffs' counsels and actual and potential class members "could seriously prejudice Gulf in its defense of this case and the conciliation efforts which have been conducted by the Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior." This reason is insufficient to justify the imposition of limits on communications. Past judicial attempts to curb even mass-media dissemination of "out-of-court publications pertaining to a pending case," *Bridges v. California,* 314 U.S. 252, 268 (1941), have been held unconstitutional. To justify criminal punishment (let alone prior restraint) there must be an imminent peril to the administration of justice. *Craig v. Harney,* 331 U.S. 367 (1947). In the present situation, there is no pending litigation, but only a non-judicial conciliation agreement of attempts to curb out of court statements concerning pending litigation are unconstitutional, then surely an order limiting communications with class members with respect to a settlement agreement is likewise unconstitutional. Moreover, the conciliation agreement to which the defendant refers grows out of Commission Charge No. AU68-9-154E. This

present lawsuit is concerned with charges filed by employees of the defendant before the EEOC in June, 1967. These charges were not the basis of the present "settlement" entered into between Gulf Oil Company, the EEOC and the U. S. Department of the Interior. Gulf's assertion on page 1 of its memorandum that "[t]he issues which have been raised in this lawsuit have been the subject of settlement negotiations between Gulf, the U. S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U. S. Department of Interior" is erroneous. The plain truth is that Gulf Oil Co. did not wish to entertain conciliation discussions to resolve the complaints of employees which forms the springboard for this present action. A copy of a letter to that effect from the EEOC to Mr. Wesley P. Bernard, one of the named plaintiffs, is attached as Exhibit C.

Most importantly private individuals have a right to a *full* remedy from the affects of racial discrimination in employment. *Franks v. Bowman Transportation Co.*, 47 L.E.D. 2d 444 (1976); *Albermarle Paper Company v. Moody*, 422 U.S. 405 (1975). Individuals have a right to pursue their remedy even after there has been a "pattern and practice" suit litigated on their behalf by the federal government. *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201, *1201 cert. denied*, 411 U.S. 931 (1973); *Rodriques v. East Texas Motor Freight*, 505 F.2d 40, 65 (5th Cir. 1974) *cert. granted* on other issues. NO. 75-718 (May 25, 1976) *A fortiori*, a private suit which is designed to seek a complete remedy to employment discrimination is appropriate after a conciliation agreement which has not been approved by a federal court and for which there has been no finding that it fully or even substantially remedies the practices of discrimination at Gulf.

The order sought by Gulf Oil comes to court with a "heavy presumption against its constitutional validity," thus placing "a heavy burden [on Gulf] of showing a justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971).

Apparently, the defendant is concerned that communications may prejudice its defense of this case and its conciliation efforts. The order it seeks is replete with adminitions against solicitation. Suffice it to say that a government "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button, supra,* 371 U.S. at 439. Imposition of a prior restraint of speech and association under the guise of preventing solicitation is beyond the power of the Court under the First Amendment. Additionally, the concern for solicitation is mitigated by the American Bar Association's belief that the ordinary rules against solicitation are to be relaxed when litigation is "wholesome and beneficial". ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 148, at 311 (1935) The policy underlying Title VII litigation has been favorably viewed. See, *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971); *Albemarle Paper Co. v. Moody, supra.* In fact, to encourage Title VII litigation, Congress saw fit to include a provision for attorneys' fees. See 42 U.S.C. § 2000e-5(b); *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir. 1974). An order limiting communications then, would serve to subvert the judicially-recognized public policy favoring vigorous prosecuting of employment discrimination actions.

The order sought by defendant Gulf Oil Company and granted by the Honorable William Steger on May 28,

1976 is, by its own wording not limited to communications directed at solicitation. It bans *all* communications, however innocuous or lawful those communications might be. Consequently, it suffers the fatal defect of overbreadth. *NAACP v. Button, supra,* cautioned that "[B]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity. 371 U.S. at 433. The order which Gulf Oil now seeks to extend simply does not meet *Button's* test of "narrow specificity".

If the defendant's motion for an order limiting communications with any actual or potential class member is granted, a discriminatory regulation of free speech and free association would result. It would unfairly disadvantage those black employees who wish to be informed about various labor practices or about ways in which to seek additional relief not agreed to in the recently consummated conciliation agreement. Every black employee has the right to seek legal assistance, to refuse to sign a waiver of his rights, and to ask the court in a proper proceeding to grant more relief from a pattern of systemic discrimination, every black worker has the right to choose to hear comments about the problem of racial discrimination in employment by attorneys knowledgeable in that particular field. Every black worker at Gulf Oil Co. has the right to communicate with attorneys who purport to represent them in a class action involving their very livelihood, e.g., their jobs, their salaries, their promotions, their back pay, etc. All of these rights are violated by an order restricting communications.

The above infringements are all the more evident when viewed in light of the freedom of communication enjoyed by the defendants. Defense Counsel are free to consult with

their client(s) with respect to any matter relevant to this lawsuit. Their clients are able to freely communicate with black employees in the course of regular work activity and thus are able to explain their interpretation of the conciliation agreement at will. The order sought by defendant is so one-sided as to constitute a denial of due process of law. Such a violation occurs by a federally imposed discrimination which, if imposed by a state, would violate the Equal Protection Clause. *Bolling v. Sharpe,* 347 U.S. 497 (1954). This one-sidedness is clearly disadvantageous to black workers who have a right to know about employment practices and conciliation agreements from sources other than the defendant who is alleged to have commited violations of the equal employment laws.

Imposition of an order limiting communications would have a detrimentally inhibitory effect on an actual or potential class members' right to counsel. Meaningful cooperation and exchanges would be stifled because of a class members' reluctance to approach counsel on matters pertaining to the pending litigation. Suppression of all or any communications between counsel and client, or between counsel and potential client is tantamount to a denial of freedom of association. Little imagination is needed to discern that such a drastic action would be contrary to the principle that "[i]nviolability of privacy in group associations, may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs". *NAACP v. Alabama ex rel John Patterson,* 357 U.S. 449, 462 (1958). Indeed, the right to associate with one's own counsel has been called "unqualified." *Chandler v. Fretag,* 348 U.S. 3, 9 (1954). Certainly, this is especially true in

a complex fair employment action where "laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counselled adversaries. . . ." *Brotherhood of R. Trainmen v. Virginia, supra,* 377 U.S. at 7.

Finally a limit on communications would impose unconscionable barriers on the ability of plaintiffs' counsel to practice law and present a case worthy of the trust placed in them by the plaintiffs. Plaintiffs' counsel would be deprived of the opportunity to interview large groups of employees for helpful factual data and would additionally be deprived of the opportunities to conduct general inquiries. In sum, an order limiting communication would severely impede the ability of counsel to effectively present the claims of class members, to discover and assess the strengths and weaknesses of the case, and to define the scope of the issues with greater specificity. By so doing, the progress of the case will be substantially curtailed, a result entirely inconsistent with the directive of Section 706(f)(5) of Title VII:

> It shall be the duty of the judge designated . . . to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

CONCLUSION

For the reasons stated, the Defendant's Motion To Limit Communications With Any Actual Or Potetial Class Member should be denied.

[Signatures Omitted in Printing]

[Certificate of Service omitted in printing]

FIRST SUPPLEMENTAL MEMORANDUM IN SUPPORT OF GULF'S MOTION TO MODIFY ORDER

[Caption Omitted in Printing]

Filed June 16, 1976

This First Supplemental Memorandum is submitted pursuant to an order by the Court on June 11, 1976, that the parties to this action will have until Tuesday, June 15, 1976, to submit final memoranda concerning Gulf's Motion to Modify Judge Steger's order dated May 28, 1976.

During the hearing before the Court on June 11, 1976, counsel for the Plaintiffs informed the Court that he opposed a continuation of Judge Steger's Order entered May 28, 1976, and he opposed Gulf's Motion to Modify Judge Steger's Order which would allow Gulf to comply with the terms of the Conciliation Agreement entered into between Gulf, the Equal Employment Opportunity Commission (EEOC) and the Office for Equal Opportunity, U.S. Department of the Interior (OEO). In support of his position, counsel for Plaintiffs relied upon the case of *Rogers v. U.S. Steel Corporation,* 508 F.2d 152 (3rd Cir.), *cert. denied,* 420 U.S. 969 (1975). It is Gulf's position that the decision in the *Rogers* case is totally inapplicable to the facts and circumstances in this case for many reasons.

The most important reason why the *Rogers* decision is inapplicable to this case is that the Local Rule 34(d) considered by the court in that case is entirely different from the order which Gulf seeks to have entered in this

case. As the court stated in the *Rogers* case, Local Rule 34(d) of the District Court for the Western District of Pennsylvania did not incorporate the exceptions which were suggested by the *Manual for Complex Litigation.* In addition, Local Rule 34(d) was adopted from an earlier edition of the *Manual* which did not include the protected exemptions which are now included in the revised *Manual.* See *Manual for Complex Litigation,* section 1.41, p. 106 CCH Edition 1973, a copy of which is attached hereto as Exhibit A. Thus, the *Rogers* court did not consider the current suggested order concerning limitation of communications with potential class members as contained in the *Manual for Complex Litigation.* The current order suggested by the *Manual* avoids the constitutional issues raised by the plaintiffs in this case since it specifically exempts constitutionally protected communication when the substance of such communication is filed with the court.

A second reason why the *Rogers* decision is inapplicable to the present case is that we are concerned here with an order of the Court and not a Local Rule as was the court in the *Rogers* case. The court stated in *Rogers*:

> "The limited issue before us, however, is whether the District Court can prior to making a class action termination, insist on compliance with *Local Rule 34(d)* as a condition to the further consideration of a Rule 23(d)(1) motion. We hold that it may not." *Rogers supra* at 164. (Emphasis added.)

The present case does not present an issue such as the above since not only is there no Local Rule involved here, but such a Local Rule is not made a condition to the further consideration of a Rule 23(d)(1) motion.

More importantly, the Order entered by Judge Steger in the present case was made necessary due to the actions of Plaintiffs' counsel. Thus, in this case activities of counsel for the Plaintiffs have indicated that the order suggested by the *Manual for Complex Litigation* should be entered limiting communications with potential class members.

During the conference with the Court on June 11, 1976, Gulf suggested that the Court modify Judge Steger's Order to include the exemptions stated in Pretrial Order No. 15 in the *Manual for Complex Litigation.* Judge Steger's Order did not include the exemptions since he wanted to maintain the status quo of the case until this Court returned and assumed control of the case. In essence, Judge Steger wanted to limit all communications with potential class members during the Court's absence. It was recognized in the concurring opinion to *Rogers* that the current rule in the *Manual* is properly drawn: "The suggested rule found in the appendix to the *Manual for Complex Litigation,* Part 1, Section 1.41, . . . is more narrowly drawn and, as the majority points out, specifically exempts communications protected by a constitutional right." *Rogers supra* at 166.

In order that the exemptions as provided for in the *Manual for Complex Litigation* can be incorporated into Judge Steger's Order, Gulf has attached hereto as Exhibit B a suggested order which would modify Judge Steger's Order to include the exemptions. In addition to including the exemptions, Exhibit B modifies Judge Steger's Order to allow Gulf to comply, under the Court's supervision, with the requirements of the Conciliation Agreement as outlined in Gulf's pending Motion to Modify.

Finally, Gulf would like to point out to the Court the strong mandate of the Fifth Circuit Court of Appeals as stated in *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975) that private settlements of charges that the employer has violated Title VII should be encouraged. Judge Thornberry in speaking for the court stated:

> "As early as 1968, Judge Bell wrote for this Court: 'It is thus clear that there is great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation.' *Latis v. Crown Zellerbach Corp.*, (5th Cir. 1968), 398 F.2d 496, 498 (emphasis added). Subsequently, in *Dent v. St. Louis-San Francisco Ry. Co.*, (5th Cir. 1969), 406 F.2d 399, 402, Judge Coleman advanced the same thesis:
>
> > Thus it is quite apparent that the basic philosophy of these statutory provisions is that *voluntary compliance is preferable to court action and that efforts should be made to resolve these employment rights by conciliation both before and after court action.* (emphasis added.)
>
> In *Culpepper v. Reynolds Metals Co.*, (5th Cir. 1970), 421 F.2d 888, 891, we declared that 'the central theme of Title VII is 'private settlement' as an effective end to employment discrimination,' citing *Oatis*. Next, in *Hutchings v. United States Industries, Inc.*, (5th Cir. 1970), 428 F.2d 303, 309, Judge Ainsworth stated:
>
> > [I]t is clear that Congress placed great emphasis upon private settlement and the elimination of unfair practices without litigation (citing *Oatis*) on the ground that voluntary compliance is preferable to court action. (citing *Dent*). *Indeed, it is apparent that the primary role of the EEOC is to seek elimination of unlawful employment prac-*

tices by informal means leading to voluntary compliance. (emphasis added.)

Our recent excursions into this area have not detoured from the foregoing principles, but have emphasized instead their practical value." *United States v. Allegheny-Ludlum Industries, Inc. supra* at 846 and 847.

Conclusion

In view of the above stated authorities, Gulf's Motion to Modify should be granted.

[Signatures Omitted in Printing]

[Certificate of Service Omitted in Printing]

EXHIBIT A

Appendix of Materials

* * *

§ 1.41 Sample Pretrial Order No. 15—Prevention of Potential Abuses of Class Actions

(To be promptly entered in actual and potential class action orders unless there is a parallel local rule)

In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subpargraph (b)(3) of Rule 23, F.R. Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tend-

ing, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

A hearing at which applications may be presented for relaxation of this order and proposed communications with actual or potential members of the class is hereby set for _____ at _____ __m.

Dated this _____ day of _____, 19_____

_____

JUDGE

* * *

EXHIBIT B

ORDER

[Caption Omitted in Printing]

The within and foregoing motion of Gulf Oil Corporation to modify Judge Steger's Order dated May 28, 1976, having been considered;

IT IS ORDERED:

(1) That Gulf's motion to modify Judge Steger's Order dated May 28, 1976 is granted;

(2) That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:

> In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay

fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication,

if in writing, or an accurate and substantially complete summary of the communication if oral.

(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Conciliation Agreement dated April 14, 1976, between Gulf, the U.S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior;

(4) That the Clerk of Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix I;

(6) That Gulf bear the expense of mailing the notice and a copy of the Court's Order to the individuals covered by item (4) above;

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from

the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

_____

United States District Judge

June ____, 1976.

Appendix I

Pursuant to the Court's order, I have been asked to notify you that there is pending in the United States District Court for the Eastern District of Texas a lawsuit styled *Bernard, et al v. Gulf Oil Company and Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23*, being Civil Action No. B-76-183-CA. This is a suit by six individual employees at Gulf's Port Arthur Refinery who have brought this suit on their behalf and on behalf of all other individuals who are similarly situated, and alleging that Gulf and the Union have discriminated against them and the class they represent in violation of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866. This notice is being sent to you because you have been identified as an actual or potential class member who at some later date may be entitled to become a member of the class which the named Plaintiffs seek to represent.

You have received a notice from Gulf dated May 1, 1976, that you are entitled to an award of back pay under a Conciliation Agreement which has been negotiated on your behalf by the United States Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of Interior. The Court has asked me to inform you that at this time you have a choice of whether to accept the offer from Gulf dated May 1, 1976, and receive the back pay award as stated in that letter or you may decline to accept that offer at this time and at some later date be considered for inclusion in the class of individuals which the Plaintiffs seek to represent in the above mentioned lawsuit. If you

decide to accept Gulf's offer, you should execute the receipt and release enclosed in Gulf's letter to you dated May 1, 1976, and return it to Gulf within 45 days from the date of this letter. If this is done, you will receive your back pay award shortly thereafter.

If you do not execute the receipt and release and deliver it to Gulf within 45 days from the date of this letter, it will be presumed that you do not wish to accept the offer contained in Gulf's letter of May 1, 1976. Any award you might receive as a result of the above mentioned lawsuit will depend upon whether you are included in any class so certified by the Court and whether the class is declared entitled to an award of back pay by the Court.

Clerk, U.S. District Court,
Eastern District of Texas

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT GULF OIL COMPANY'S MOTION TO MODIFY ORDER

[Caption Omitted in Printing]

I

PRELIMINARY STATEMENT

This action is instituted pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e *et seq.* and 42 U.S.C. § 1981. The Complaint, filed on May 18, 1976, alleges a class action on behalf of: (a) all black employees employed by defendant Gulf Oil Company's Refinery of Port Arthur, Texas, (b) all black employees formerly employed by the defendant in Port Arthur, Texas; and (c) all black applicants for employment at Gulf Oil Company who have been rejected for employment at said Company.

II

STATEMENT OF FACTS

On May 28, 1976, the Honorable William M. Steger entered an order limiting communications with any potential or actual class member. The order was to be effective until the Honorable Joe J. Fisher could hear the matter upon formal motion. On June 8, 1976, Gulf Oil filed a Motion To Modify Judge Steger's Order dated May 28, 1976. The motion seeks to bar all further communications with actual or potential class members as well as to allow Gulf, the EEOC, and the Department of Interior to proceed under the terms of a Conciliation Agreement dated April 14, 1976. This Agreement grows out of a Commission Charge of the EEOC and is not the result of efforts

to conciliate charges brought before the EEOC against Gulf Oil by individual class complainants. Further, the Conciliation Agreement is not an attempted settlement of a civil action brought in a federal court.

A hearing on the Motion To Limit Communications was held before the Honorble Joe J. Fisher on June 11, 1976. Judge Fisher deferred ruling on the motion pending the submission of memoranda on the Motion to Modify.

III

ARGUMENT

Gulf Oil's Motion To Modify Order is predicated on the order entered by the Honorable William M. Steger on May 28, 1976. The legal propriety of that order was addressed in plaintiffs' Memorandum of Law In Opposition To Defendant Gulf Oil Company's Motion to Limit Communications with Any Actual or Potential Class Member, submitted to this Court on June 10, 1976. The arguments advanced in that memo are hereby incorporated by reference into this present memo. To summarize, plaintiffs aver that (1) the order is not within the power of a district court to grant. See *Rodgers v. United States Steel Corporation,* 508 F.2d 152 (3rd Cir.), *cert. denied,* 420 U.S. 969 (1975); *Rodgers v. United States Steel Corporation and Honorable Hubert I. Teitelbaum,* No. 76-1340 (3rd Cir., June 1976); (2) the order infringes upon constitutionally protected First Amendment freedom of speech, freedom of association, and privacy of association. See *NAACP v. Button,* 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia ex rel State Bar,* 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967); *United Transportation Union v. State Bar of Michigan,*

401 U.S. 576 (1971); (3) the order violates the Due Process Clause of the Fifth Amendment in that it unfairly discriminates in favor of the defendants. See *Bolling v. Sharpe,* 347 U.S. 497 (1954); and, (4) the order is unconstitutional on its face because of the fatal defect of overbreadth. See *NAACP v. Button, supra.* A finding, therefore, of constitutional infirmity with respect to the Motion To Limit Communications destroys the merits of defendant's Motion To Modify the order since the latter is based upon the validity of the former.

Gulf Oil Company relies on two cases, *Weight Watchers of Philadelphia, Inc., v. Weight Watchers International, Inc.,* 455 F.2d 770 (2nd Cir. 1972), and *American Finance System, Inc., v. Harlow,* 65 F.R.D. 572 (D. Md. 1974) to support its Motion To Modify. These cases, however, concerned themselves with defendants' attempts to negotiate settlements of purported class action suits with individual members of the asserted class *after* a lawsuit had been filed. In the instant case, Gulf is attempting not only to restrain communications with actual or potential class members, but also is seeking to continue offering backpay settlements to affected class members in a Conciliation Agreement which was not the subject of a court action.[1] The plaintiffs are simply attempting to

1. The plaintiffs are not trying to stop the Company from tendering offers under the Conciliation Agreement. These tenders are made pursuant to a private agreement, not judicially approved, between two agencies of the Government and the Company. Neither the Union defendant nor the plaintiffs' class were parties to this agreement. The legality of the waivers remains to be determined. *United States v. Allegheny Ludlum Industries,* 517 F.2d 826 (5th Cir. 1975) *cert. denied* U.S.L.W. (1976). However, the plaintiffs and the class they represent have an unfettered right to consult with attorneys experienced in civil rights and fair employment litigation concerning their alternatives. See Exhibit A-C.

communicate to other asserted class members the issues involved in the present lawsuit and also the problems and alternatives to the Conciliation Agreement entered into between Gulf Oil, the EEOC and the Department of the Interior. (*See* Affidavits attached hereto as Exhibits A-C). To disallow this right to the plaintiffs would be to ignore the teachings of *Rodgers v. U. S. Steel,* supra, and *NAACP v. Button, supra.*

Regardless of how the defendants proceed, the right to challenge the validity and fairness of the proposed non-judicial "settlement" is not pre-empted by the defendants' actions or the purported class members' responses. See, e.g. *Williamson v. Bethlehem Steel Corp.,* 468 F.2d 1201 (2nd Cir. 1972), *cert. denied,* 411 U.S. 931 (1973); *Rodriguez v. East Texas Motor Freight,* 505 F.2d 40, 65 (5th Cir. 1974), *cert. granted on other issues,* 44 U.S.L.W. 3661 (May 25, 1976); *United States v. Allegheny-Ludlum Industries, Inc.,* 517 F.2d 826 (5th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3593 (Apr. 20, 1976).

In its memorandum to the Court, Gulf Oil Co. relies heavily on the affidavits of EEOC and Interior Officials in support of the Conciliation Agreement. Initially, it must be emphasized that the adequacy of the conciliation agreement is not at issue at this time. Moreover, without any presentation of evidence it is, of course, impossible for this Court to evaluate the adequacy of the Conciliation Agreement. But, the agreement on its face does not appear to satisfy the dictates of Title VII. For instance, the Conciliation Agreement does not provide for well-established types of relief such as advance-level entry and job by-pass; there is a one-shot opportunity to bid and

transfer into a different job classification; there are no provisions for a firm recruitment program; there is no firm commitment on goals and timetables; the affirmative action program is merely a statement of policy rather than a realistic, programmatic approach to the underutilization of minorities in the defendant's work-force. The goals provided, one black, mexican-american, or woman for each four whites selected for jobs from which blacks are underutilized (the goal is one to six for supervisory positions) is inadequate to remedy the practices of discrimination in an area where over 50% of the population is black; there is no relief from unlawful employment testing programs. These are only some of the examples of how the Agreement does not begin to approach the relief requested by the plaintiffs. In fact, the settlement agreement simply does not satisfy the purpose underlying fair employment litigation which is to "make whole" those persons injured by discriminatory employment practices. *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975).

Additionally, the notices that were sent out to backpay eligibles under the Conciliation Agreement did not explain the types and extent of relief in the agreement, and did not explain the method by which backpay was computed. Further, the affected employees were not told that acceptance of the agreement would be assumed if after the passage of thirty days, the employees had not responded to Gulf's notice. All of the above reasons make communications between the class attorneys with potential and/or actual class members essential. It cannot be assumed that because the government agencies, EEOC and Department of Interior, have approved the settlement of a Commissioner's Charge that the practices of discrimi-

nation have been remedied; as the Fifth Circuit stated in *Rodriquez*:

> While the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution. 505 F.2d at 66.

Gulf's concern that there be a limit on communications so that ". . . individuals . . . might make their own independent decision concerning the acceptance of the back-pay award", (p.4 of defendant's memorandum to the Court) is not in accord with the principle that " . . . the Constitution protects expression and association without regard to the . . . truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button, supra,* at 444-445. Plaintiffs submit that the defendant, Gulf Oil, has not more business telling them how to deal with their associates that the plaintiffs have in instructing Gulf how to deal with its associates and advisors. Moreover, the class members have a right to be informed by counsel as to their rights under the civil rights laws.

CONCLUSION

For the reasons stated, the Defendant's Motion To Modify The Order should be denied.

[Signatures Omitted in Printing]

[Certificate of Service Omitted in Printing]

EXHIBIT "A"

AFFIDAVIT

[Caption Omitted in Printing]

STATE OF NEW YORK

COUNTY OF NEW YORK

BARRY L. GOLDSTEIN, being duly sworn, deposes and says:

1. I am one of the attorneys for the plaintiffs herein. I am employed as a staff attorney with the NAACP Legal Defense and Educational Fund, Inc., in New York City. I have worked there as an attorney since August, 1971. During the years of my employment I have been continuously and almost exclusively involved in the litigation in federal courts in various states of employment discrimination cases.

2. The Legal Defense and Educational Fund, Inc., is a non-profit corporation engaged in furnishing legal assistance in cases involving claims of racial discrimination. I am an attorney admitted to the practice of law before the Appellate Division of the State of New York, the United States District Court for the Southern and Eastern Districts of New York, the United States Court of Appeals for the Second, Fourth, Fifth and Sixth Circuits and Supreme Court of the United States.

3. The Legal Defense Fund has been approved by the Appellate Division of the State of New York to function as a legal aid organization. It is entirely separate and apart from the National Association for the Advancement of Colored People (N.A.A.C.P.).

4. Since 1940, the Legal Defense Fund has furnished legal assistance in civil rights matters in state and federal courts throughout the nation, usually in conjunction with local counsel. See *N.A.A.C.P. v. Button,* 371 U.S. 415, 421, n.5 (1963). The United States Supreme Court has cited the organization as one "which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button, id.* at 422. As pointed out by Chief Judge Brown attorneys employed at the Legal Defense Fund have represented individuals in hundreds of civil rights cases in the Fifth Circuit and in the district courts of that circuit, *Miller v. Amusement Enterprises, Inc.,* 426 F.2d 534, 539, n.14 (5th Cir. 1970).

5. Specifically attorneys at the Legal Defense Fund have represented the plaintiffs in many landmark cases brought pursuant to Title VII which have been decided in the Supreme Court,[1] the Fifth Circuit,[2] and in other Circuits.[3]

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1. See e.g., *Griggs v. Duke Power Company,* 401 U.S. 424 (1971); *Phillips v. Martin-Marietta Corp.,* 400 U.S. 542 (1971); *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973); *Johnson v. Railroad Express Agency,* 421 U.S. 454 (1975); *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975); *Franks v. Bowman Transportation Co.,* 47 L.Ed.2d 444 (1976); *Brown v. General Service Administration,* 44 U.S.L.W. 4704 (1976).

2. *King v. Georgia Power Co.,* 474 F.2d 906 (1973); *Johnson v. Georgia Highway Express,* 488 F.2d 714 (1974); see e.g., *Johnson v. Goodyear Tire & Rubber Co.,* 491 F.2d 1364 (1974); *Pettway v. American Cast Iron Pipe Co.,* 494 F.2d 211 (1974); *Gamble v. Birmingham Southern Railroad Co.,* 514 F.2d 678 (1975); *Ford v. United States Steel Corporation,* 520 F.2d 1043 (1975); *Watkins v. Scott Paper Co.,* ____F.2d____ (5th Cir. 1976), 11 EPD ¶ 10,880.

3. *Chance v. Bd. of Examiners,* 458 F.2d 1167 (2nd Cir. 1972); *Patterson v. N.M.D.U.,* 514 F.2d 767 (2nd Cir. 1975); *Rodgers v. U.S. Steel Corp.,* 508 F.2d 152 (3rd Cir. 1975); *Robinson v.*

6. In undertaking to represent the named plaintiffs in this action, neither I nor any other attorney at the Legal Defense Fund has accepted or expects to receive any compensation from them, nor do we expect to receive any compensation from any additional named plaintiffs who may hereafter be added, or from any member of the plaintiff's class.

7. The fees collected for work done by me or any employee of the Legal Defense Fund in regard to this litigation will result from court-awarded attorneys' fees which are taxed as costs to a defendant(s). See 42 U.S.C. §2000e-5(k). These fees will be paid over to the Legal Defense Fund and will not be paid directly to me or to any other staff attorney.

8. At this stage in the proceedings, plaintiffs' counsel find it necessary to communicate with members of the proposed class of black employees alleged to have been subjected to racial discrimination by Gulf Oil Company and the Oil, Chemical, and Atomic Workers International Local Union 4-23. Otherwise, plaintiffs and their attorneys will be restrained from effectively representing the claims of class members, completing discovery, and defining the scope of the issues with specificity. Only by communicating with members of the proposed class with individual complaints of racial discrimination can plaintiffs' counsel investigate systematic and individual racial

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Lorillard Co., 444 F.2d 791 (4th Cir. 1971); *Patterson v. American Tobacco Co.*, ____F.2d____, 11 EPD ¶ 10,728 (4th Cir. 1976); *Newman v. Avco*, 451 F.2d 743 (6th Cir. 1971); *Rice v. Gates Rubber Co.*, 521 F.2d 782 (6th Cir. 1975); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974) *cert. denied* 44 U.S.L.W. 3670 (May 25, 1976); *Rogers v. International Paper Co.*, 510 F.2d 1340 (8th Cir. 1975) vac. and rem. 44 U.S.L.W. 3199 (Oct. 7, 1975).

discrimination in employment at Gulf Oil Company and supplement documents and records to be obtained from defendant company.

9. Also it is essential that plaintiffs' attorneys be able to communicate with class members in order to inform them of their rights under the fair employment laws and to answer any questions or concerns which they may have. This is of crucial importance at this time because of the offers being tendered to class members under the Conciliation Agreement entered into between the EEOC and Gulf Oil Company.

BARRY L. GOLDSTEIN

Sworn to and subscribed before me
this 16th day of June, 1976

GERTRUDE A. REYNOLDS
Notary Public

EXHIBIT B

AFFIDAVIT OF ULYSSES GENE THIBODEAUX

[Caption Omitted in Printing]

STATE OF NEW YORK

COUNTY OF NEW YORK

ULYSSES GENE THIBODEAUX, being duly sworn, deposes and says:

1. I am one of the attorneys for the plaintiffs herein. I am licensed to practice law in the State of Louisiana and am presently serving as an Earl Warren Fellow with the NAACP Legal Defense and Educational Fund, Inc. in New York City.

2. The Earl Warren Fellowship Program is part of the legal training program of the Legal Defense Fund. It functions as a vehicle to prepare young attorneys in substantive civil rights litigation and federal procedure. As an Earl Warren Fellow, I have been involved in various areas of civil rights law. My primary area of concentration, however, has been in fair employment litigation.

3. This action was commenced by the filing of a complaint on May 18, 1976.

4. On May 22, 1976, the named plaintiffs in this action held a meeting in Port Arthur, Texas. In attendance were black workers who are employed or were employed by Gulf Oil Company in Port Arthur, Texas and who are members of the class alleged in this action.

5. The meeting on May 22, 1976 was requested by the named plaintiffs in this action.

6. Attorneys representing the named plaintiffs were invited to attend the meeting to discuss the issues involved in the lawsuit, the types of relief requested, and to generally explain some of the administrative and legal problems inherent in fair employment litigation. I, along with Charles E. Cotton of New Orleans, Louisiana and Stella M. Morrison of Port Arthur, Texas accepted the invitations to speak to the group and to answer questions concerning the pending lawsuit and the Conciliation Agreement entered into between Gulf, the EEOC, and the United States Department of the Interior on April 14, 1976.

7. Contrary to the Company's assertion in its memoranda filed on May 27 and June 8, 1976, I did not at any time during the course of the meeting advise actual or potential class members not to accept the defendant's offer of settlement, nor did I state to the assembled group that counsel for the plaintiffs could obtain twice the amount of backpay for the class as has been offered to them under the Conciliation Agreement of April 14, 1976.

8. The ability of plaintiffs and their counsel to present effectively the claims of class members, to discover the case, and to define the scope of the issues with greater specificity depends in significant part on their having access to class members, to investigate their complaints, to prepare witnesses, and to supplement the available defendants' documentary materials by interviewing their

employees. At this stage, such communication becomes appropriate and necessary.

ULYSSES GENE THIBODEAUX

Dated:

Sworn to and subscribed before
me this 16th day of June, 1976.

GERTRUDE A. REYNOLDS
Notary Public

EXHIBIT C

AFFIDAVIT OF STELLA M. MORRISON

[Caption Omitted in Printing]

STATE OF TEXAS

COUNTY OF JEFFERSON

STELLA M. MORRISON, being duly sworn, deposes and says:

1. I am one of the attorneys for the plaintiffs herein: I am associated with the Port Arthur, Texas firm of Morrison, Floyd and Morrison and I am licensed to practice law in the State of Texas.

2. I accepted an invitation to attend a meeting of named plaintiffs and interested parties held in Port Arthur, Texas on May 22, 1976.

3. During the meeting on May 22, 1976, I answered questions directed to me by several of the interested parties with respect to the issues and problems contemplated in this lawsuit.

4. During the course of the May 22, 1976 meeting, Mr. Ulysses Gene Thibodeaux, one of the attorneys for the plaintiffs, contrary to the assertions made by the defendant Company, did not recommend the refusal of the offer of settlement by Gulf Oil Company pursuant to the Conciliation Agreement of April 14, 1976, nor did Mr. Thibodeaux represent that attorneys for the plaintiffs could secure twice the monetary settlement of the Conciliation Agreement in a civil action in federal court.

5. In undertaking to represent the named plaintiffs, neither I nor any of the attorneys representing the plaintiffs accepted or expect any compensation from them, nor do we expect to receive any compensation from any additional named plaintiffs who may hereafter be added, or from any member of the plaintiff class. We expect to be compensated only by such attorney's fees as may eventually be awarded by the court. My entitlement to an award of counsel fees by the court would not be affected by the number of individuals named as parties plaintiff since the fees are not paid by the clients but, rather, they are taxed as costs to the defendant(s). See 42 U.S.C. §2000e-5(k).

6. The ability of plaintiffs and their counsel to present effectively the claims of class members, to discover the case, and to define the scope of the issues with greater specificity depends in significant part on their having access to class members, to investigate their complaints, to prepare witnesses, and to supplement the available defendants' documentary materials by interviewing their employees. At this stage, such communication becomes appropriate and necessary.

7. As of this date thirty-four individual members of the class have signed retainer agreements which retain myself and my co-counsel as their attorneys to represent them in litigation designed to fully protect their rights under the fair employment laws and to seek a full remedy for

any injury they my have suffered as a result of the unlawful employment practices of the defendants.

STELLA M. MORRISON
Stella M. Morrison

Dated:

Sworn to and subscribed before
me this 17th day of June, 1976

GWENDOLYN BLAKE
Notary Public in and for
Jefferson County, Texas

MOTION BY DEFENDANT GULF OIL CORPORATION TO DISMISS COMPLAINT

[Caption Omitted in Printing]

Comes now Gulf Oil Corporation, a Defendant in the above styled cause, and moves the Court for an order to dismiss the Complaint herein pursuant to Rule 12(b) (1) and (6) of the Federal Rules of Civil Procedure and for an order granting such other, further and different relief as the Court may deem just and proper.

This motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state claims upon which relief may be granted is made on the following grounds:

(1) The jurisdictional prerequisites for maintaining this action contained in Title VII of the Civil Rights Act of 1964, as amended, have not been met;

(2) This action is barred by the applicable statute of limitations;

(3) This action is barred by laches;

(4) The Complaint fails to set forth the elements of Plaintiffs' purported claims sufficiently to show that Plaintiffs are entitled to relief;

(5) The Complaint fails to plead with particularity the circumstances showing that the Plaintiffs have met the requirements of Title VII of the Civil Rights Act of 1964, as amended, 42. U.S.C. §2000e, *et seq.;* and

(6) The Complaint fails to state a claim upon which relief can be granted.

In connection with this motion, the undersigned Defendant relies upon the Complaint filed herein, as well as upon the supporting memorandum to be filed.

[Signatures Omitted in Printing]

[Certificate of Service Omitted in Printing]

ORDER

[Caption Omitted in Printing]

The within and foregoing Motion of Gulf Oil Corporation to Dismiss having been considered:

IT IS ORDERED that the Complaint in this action be dismissed, with prejudice, and that the Plaintiffs bear all costs of this action.

_____

United States District Judge

ORDER

[Caption Omitted in Printing]

Filed June 22, 1976

The within and foregoing motion of Gulf Oil Corporation to modify Judge Steger's Order dated May 28, 1976, having been considered;

IT IS ORDERED:

(1) That Gulf's motion to modify Judge Steger's Order dated May 28, 1976 is granted;

(2) That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:

In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal

parties to the class action of requests by class members to opt out in class actions under subparagraph (b) (3) of Rule 23, F.R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Con-

ciliation Agreement dated April 14, 1976, between Gulf, the U. S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U. S. Department of the Interior; That the private settlement of charges that the employer has violated Title VII is to be encouraged, *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F2d 826 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3589 (U. S. April 20, 1976).

(4) That the Clerk of the Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix I;

(6) That Gulf bear the expense of mailing the notice and a copy of the Court's order to the individuals covered by item (4) above:

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

It is Plaintiff's contention that any such provisions as hereinbefore stated that limit communication with potential class members are constitutionally invalid, citing *Rodgers v. United States Steel Corporation,* 508 F.2d 152 (3rd Cir. 1975), *cert. denied,* 420 U.S. 969 (1975). This Court finds that the *Rodgers* case is inapplicable, and that this order comports with the requisites set out in the *Manual for Complex Litigation,* Section 1.41 p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court.

ENTERED this the 22nd day of June, 1976.

JOE J. FISHER
United States District Judge

APPENDIX I

Pursuant to the Court's order, I have been asked to notify you that there is pending in the United States District Court for the Eastern District of Texas a lawsuit styled *Bernard, et al v. Gulf Oil Company and Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23,* being Civil Action No. B-76-183-CA. This is a suit by six individual employees at Gulf's Port Arthur Refinery who have brought this suit on their behalf and on behalf of all other individuals who are similarly situated, and alleging that Gulf and the Union have discriminated against them and the class they represent in violation of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866. This notice is being sent to you because you have been identified as an actual or potential class member who at some later date may be entitled to become a member of the class which the named Plaintiffs seek to represent.

You have received a notice from Gulf dated May 1, 1976, that you are entitled to an award of back pay under a Conciliation Agreement which has been negotiated on your behalf by the United States Equal Employment Opportunity Commission and the Office for Equal Opportunity, U. S. Department of Interior. The Court has asked me to inform you that at this time you have a choice of whether to accept the offer from Gulf dated May 1, 1976, and receive the back pay award as stated in that letter or you may decline to accept that offer at this time and at some later date be considered for inclusion in the class of individuals which the Plaintiffs seek to represent in the above mentioned lawsuit. If you decide to accept Gulf's offer, you should execute the re-

ceipt and release enclosed in Gulf's letter to you dated May 1, 1976, and return it to Gulf within 45 days from the date of this letter. If this is done, you will receive your back pay award shortly thereafter.

If you do not execute the receipt and release and deliver it to Gulf within 45 days from the date of this letter, it will be presumed that you do not wish to accept the offer contained in Gulf's letter of May 1, 1976. Any award you might receive as a result of the above mentioned lawsuit will depend upon whether you are included in any class so certified by the Court and whether the class is declared entitled to an award of back pay by the Court.

Clerk, U.S. District Court,
Eastern District of Texas

MOTION FOR PERMISSION TO COMMUNICATE WITH MEMBERS OF THE PROPOSED CLASS

[Caption Omitted in Printing]

Filed July 6, 1976

Plaintiffs hereby respectfully move that the Court grant them and their counsel permission to contact and interview members of the proposed class in this action, and to declare that the leaflet attached hereto as Exhibit A is within the constitutionally protected rights of the plaintiffs and their counsel. Plaintiffs seek this permission pursuant to this Court's Order of June 22, 1976, attached hereto as Exhibit B, which limited communications with actual or potential class members.

In support of their motion, plaintiffs show the following:

1. The attached leaflet is a constitutionally protected form of political expression. *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963).

2. The leaflet furthers the right of black employees of Gulf Oil Company's Refinery in Port Arthur, Texas to associate for the purpose of being fairly represented in this pending lawsuit. *Brotherhood of Railroad Trainmen v. Virginia State Bar,* 377 U.S. 1 (1964).

3. The ability of plaintiffs and their counsel to present effectively the claims of class members, to discover the case, to define the scope of the issues with greater specificity, and to explain to class members the provisions of the Conciliation Agreement of April, 1976 depends in significant part on their having access to class members.

Such communication is particularly important in view of the 45 day limitation in which affected class members have to respond to the offer of settlement contained in the Conciliation Agreement.

4. Neither the offer of settlement nor the notice set out in Appendix I of the June 22, 1976 Order explains the terms of the Conciliation Agreement.

5. A general order allowing communications is appropriate. It would be impractical and unworkable for plaintiffs to reapply specifically for permission to communicate with particular class members.

6. Plaintiffs feel that the attached leaflet is consistent with Paragraph 2 of this Court's Order of June 22, 1976, i.e., it represents an attempt to assert "a constitutional right to communicate with any member of the class without prior restraint". Because the Order is vague, and for reasons of prudence, plaintiffs find it appropriate to seek this Court's guidance in this matter.

WHEREFORE, plaintiffs respectfully move that the Court grant them and their counsel permission to communicate with class members concerning this action and order that the attached leaflet is a constitutionally protected activity.

[Signatures Omitted in Printing]

EXHIBIT A

ATTENTION
BLACK WORKERS
OF GULF OIL

The Company has asked you to sign a release. If you do, you may be giving up very important civil rights. It is important that you fully understand what you are getting in return for the release. *IT IS IMPORTANT THAT YOU TALK TO A LAWYER BEFORE YOU SIGN*. These lawyers will talk to you *FOR FREE*:

STELLA M. MORRISON
440 Austin Avenue
Room 516
Port Arthur, Texas 77640
(713) 985-9358

BARRY L. GOLDSTEIN
ULYSSES GENE THIBODEAUX
10 Columbus Circle
Suite 2030
New York, New York 10019
(212) 586-8397

CHARLES E. COTTON
348 Baronne Street
Suite 500
New Orleans, Louisiana 70112
(504) 522-2133

These lawyers represent six of your fellow workers in a lawsuit titled *Bernard v. Gulf Oil Co.*, which was filed in Beaumont Federal Court on behalf of all of you. This suit seeks to correct fully the alleged discriminatory practices of Gulf.

Even if you have already signed the release, talk to a lawyer. You may consult another attorney. If necessary, have him contact the above-named lawyers for more details. All discussions will be kept strictly confidential.

AGAIN, IT IS IMPORTANT THAT YOU TALK TO A LAWYER. Whatever your decision might be, we will continue to vigorously prosecute this lawsuit in order to correct all the alleged discriminatory practices at Gulf Oil.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PERMISSION TO COMMUNICATE WITH MEMBERS OF THE PROPOSED CLASS

[Caption Omitted in Printing]

I.

PRELIMINARY STATEMENT

This action is instituted pursuant to Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000-e *et seq.* and 42 U.S.C. § 1981. The Complaint, filed on May 18, 1976, alleges a class action on behalf of (a) all black employees employed by defendant Gulf Oil Company's Refinery of Port Arthur, Texas, (b) all black employees formerly employed by the defendant in Port Arthur, Texas, and (c) all black applicants for employment at Gulf Oil Company who have been rejected for employment at said Company.

II.

STATEMENT OF FACTS

On June 22, 1976, the Honorable Joe J. Fisher entered an Order limiting communications with any potential and actual class members who are not formal parties to this action. This Order does not forbid communication initiated by a client or prospective client and excepts constitutionally-protected communications with any member of the class without prior restraint. The latter exception is subject to the qualification that the Court must be notified of the substance of such communications within five days after the communication.

The June 22 Order permits Gulf Oil to proceed under the terms of the April 14, 1976 Conciliation Agreement. Gulf Oil is now able to continue offering back pay awards and releases to its employees who are covered by the Conciliation Agreement. Affected employees will have 45 days in which to accept the back pay awards. At the expiration of 45 days, the offers will expire.

III.

ARGUMENT

The plaintiffs' unqualified contention that there should be no restrictions on the actual and potential class members to this action to be fully informed of their rights has been addressed in the previous memoranda submitted to this Court on June 10 and 17, 1976. The arguments advanced therein are specifically incorporated into this memorandum, along with the affidavits accompanying the June 17th memo. An unfettered opportunity to communicate generally with proposed class members is made even more imperative when viewed in terms of the significance of the purported waivers. As a condition to the receipt of a back pay award, an eligible member of the affected class must execute a blanket waiver of all claims of racial discrimination against Gulf Oil occurring on or before the date of the release, or which might arise as the result of future effects of past or present employment practices. In essence, an affected employee or former employee is being asked to relinquish the right to be free from all forms of racially discrimniatory employment practices at Gulf; additionally, he is being asked to surrender his right to sue in order to vindicate civil rights which have been deemed

to be of high public importance. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Alexander v. Gardner Denver*, 415 U.S. 36 (1974); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The waivers are a transparent attempt to frustrate the effectuation of an important Congressional policy against racial discrimination in employment, "one of the most deplorable forms of discrimination known to our society." *Culpepper v. Reynolds Metal Co.*, 421 F.2d 888, 891 (5th Cir. 1970).

Because the waivers may possibly serve to undermine[1] important individual and class rights and public policy considerations, affected class members must be informed of their right to seek counsel. Their right to seek the advice of attorneys is incontestable. See *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois Bar*, 389 U.S. 217 (1967); *United Transportation Union v. Michigan Bar*, 401 U.S. 576 (1971). Professional legal advice is especially important, also, because of the complicated legal and factual questions involved in fair employment litigation. The defendant has the benefit of legal practitioners. In contrast, the purported class members in this action are left to speculate on a proper course of action. For instance, the waiver is not accompanied by a copy of the Conciliation Agreement, nor does it seek to explain to a worker the structural changes, if any, contemplated by the Agreement. Rather than seeking to inform the workers so that intelligent and knowing decisions could

---

1. The plaintiffs do not in any manner concede the legal efficacy of the waivers. The validity of these waivers will have to be subjected to judicial scrutiny during the consideration of the merits of this litigation.

be made, the waivers dissuaded fruitful discussions of the matter.

In its Memorandum In Support of Gulf Oil Companys' Motion To Modify Order (p. 4) and during the June 11, 1976 hearing on this Motion, the defendant asserted that a limitation on communications would enable affected employees to "make their sum independent decisions concerning the acceptance of the back pay award". It appears eminently proper that before such "independent decisions" can be made, black workers and their counsel should be allowed to communicate. Gulf Oil will communicate with all of the affected members who fall eligible under the terms of the Conciliation Agreement. This communication will include a notice extending an offer to back pay on the condition that an employee execute, within forty-five days, a release which would waive all of the employees' claims against Gulf Oil. Even though this communication may be supervised by this Court, it would be manifestly inequitable to allow Gulf Oil to so communicate while barring plaintiffs and their counsel from representing or advising these individuals with respect to the provisions of the Conciliation Agreement as well as any other aspect of employment discrimination. Plaintiffs and their attorneys have every intention of representing the best interests of the class. As the incorporated affidavits point out, plaintiffs' attorneys are knowledgeable and skilled in fair employment litigation, and have not accepted any fee for their legal representation.

Plaintiffs feel that the leaflet attached to the motion as Exhibit A is within the range of permissible activity sanctioned by the June 22, 1976 Order. However, in the interest of staying within ethical boundaries and pro-

tecting ourselves from contempt citations, plaintiffs and their counsel seek an order allowing distribution of the leaflet and opportunities to interview proposed class members. It is felt that an offer to communicate to the plaintiffs their rights under the fair employment laws, the relief provided by the Conciliation Agreement, and the possible consequences of signing the general waivers is a reasonable undertaking in view of the factors listed above, especially when the confidentiality of these discussions under the attorney-client relationship will be zealously guarded.

IV.

CONCLUSION

Plaintiffs and their counsel should be permitted to communicate generally with actual and potential class members employed by Gulf Oil Company since the denial of this request would unreasonably restrict counsels' right to practice law and the right of the named plaintiffs and proposed class members to counsel of their own choosing. It is important that the usual protection of confidentiality between attorney-client communications be afforded here. Moreover, denial of the motion would abridge the rights of freedom of speech and freedom of association to plaintiffs' counsel, the named plaintiffs, and members of the proposed class.

[Signatures Omitted in Printing]

[Certificate of Service Omitted in Printing]

MEMORANDUM ON BEHALF OF GULF OIL CORPORATION IN OPPOSITION TO PLAINTIFFS' MOTION FOR PERMISSION TO COMMUNICATE WITH MEMBERS OF THE PROPOSED CLASS

[Caption Omitted in Printing]

Filed July 15, 1976

On July 6, 1976, the Defendant Gulf Oil Corporation (hereinafter referred to as Gulf) was served with Plaintiffs' Motion for Permission to Communicate with Members of the Proposed Class. Attached to Plaintiffs' Motion was "Exhibit A" which contained a statement which Plaintiffs' counsel seeks to have distributed to an undesignated group of "black workers of Gulf Oil". (Plaintiffs' Exhibit A to its Motion will hereinafter be referred to as "the proposed leaflet"). The Plaintiffs do not disclose how the proposed leaflet will be distributed to the unidentified group of "black workers of Gulf Oil".

The Plaintiffs contend that the distribution of the proposed leaflet is consistent with the Court's order dated June 22, 1976, which placed strict limits on communications concerning this action between all parties thereto, their counsel and any potential or actual class member not a formal party to the action. Apparently, the Plaintiffs seek to assert this Motion pursuant to the portion of the Court's order which allows communications with potential or actual class members when such proposed communications are presented to the Court in writing pursuant to a formal motion and proposed order. However, the Plaintiffs have not complied with the terms of the order since it provides "any such proposed communica-

tion shall be presented to this Court in writing *with a designation of or description of all addresses* and with a motion and proposed order for prior approval by this Court of the proposed communication". The Plaintiffs' attorneys have not provided a designation or description of all addresses who are to receive the leaflet.

More importantly, the proposed leaflet falls directly within the scope of those communications which are strictly forbidden by the Court's order. The communications strictly forbidden by the order are as follows:

> "(a) Solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action;
>
> (b) Solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action;
>
> (c) Solicitation by formal parties to the class action or request by class members to opt out in class actions under subparagraph (b)(c) of Rule 23, F. R. Civ. P.; and
>
> (d) Communications from counsel or a party which may tend to misrepresent the status, purposes and affects of the class action, and of any actual or potential court orders herein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice."

The proposed leaflet which the Plaintiffs seek to have distributed to the undesignated group of black employees falls within one or more of the above forbidden communications. Although the proposed leaflet does not ex-

pressly state that its purpose is to solicit directly or indirectly legal representation of the person receiving the leaflet, language in the proposed leaflet tends to suggest that the attorneys in this case already represent all "black workers of Gulf Oil". The second paragraph of the pamphlet states, "These lawyers represent six of your fellow workers in a lawsuit titled *Bernard v. Gulf Oil Company* which was filed in Beaumont in Federal Court on behalf of all of you." Until this Court determines otherwise, it is impossible to know whom the Plaintiffs represent in this case. Certainly it cannot be said that the Plaintiffs represent all persons who will receive a copy of this leaflet. Even if it can be assumed that the leaflet will be distributed to "black workers of Gulf Oil" it cannot be said that the Plaintiffs in this suit represent all of those individuals unless and until the Court so rules. Consequently, the proposed leaflet not only tends to solicit directly or indirectly the legal representation of all "black workers of Gulf Oil"; but it misrepresents to them that they are indeed already represented by the Plaintiffs in this case.

The Court's order forbids the distribution of this leaflet in that it "may tend to misrepresent the status, purposes and effects of the class action and of any actual or potential Court orders herein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court or the administration of justice." It can be seen from the above paragraph that the proposed leaflet tends to misrepresent the fact that all "black workers of Gulf Oil" are being represented by the Plaintiffs' attorneys in this suit. First, the huge letters at the top of the leaflet which states "Attention

Black Workers of Gulf Oil" misrepresents a material fact. The leaflet indicates that the company (Gulf) has asked all of the "black workers of Gulf Oil" to sign a release. This is not the case. Only those black employees who have received benefits under the Conciliation Agreement have been asked to sign a release. There are other black workers at Gulf's Port Arthur Refinery who have not been asked to sign a release since they did not receive benefits under the Conciliation Agreement. More importantly, however, the leaflet does not indicate that the controversy before this Court is limited only to black employees at Gulf's Port Arthur Refinery. If copies of the leaflet happen to be "passed on" to black workers at the hundreds of Gulf installations throughout the United States a great amount of confusion could result. If this happens, it may become necessary to clarify the misrepresentations made in the proposed leaflet by sending letters to all black workers of Gulf Oil Corporation in the United States in an effort to clarify the situation. Certainly, the parties to this suit do not wish to burden the Court with such possibilities.

The second sentence of the proposed leaflet indicates that if a "black worker" signs a release, he may be giving up "very important civil rights". This statement absolutely misrepresents the facts in this case and would create impressions which would reflect adversely upon the benefits which have been negotiated on behalf of black employees at Gulf's Port Arthur Plant by two Federal Agencies, the Equal Employment Opportunity Commission and the Office of Equal Opportunity. Furthermore, the notice tends to reflect adversely upon the Court's order which required the Clerk to send notices to the potential class members informing them that they may accept the benefits under

the Conciliation Agreement. The individuals who would receive a copy of the leaflet may get the impression that the Court has ruled that by signing the release important civil rights have been given up. Such misrepresentations and impressions are expressly prohibited by the Court's order dated June 22, 1976.

It can be seen from this discussion that the proposed leaflet is the type of communication which the Court's order specifically sought to prevent. It is the type of communication which will serve to confuse, misrepresent, and distort the issues involved in this lawsuit in addition to having the potential effect of confusing "black workers" at other Gulf facilities in Texas and across the United States.

Turning now to the Memorandum in Support of the Plaintiffs' Motion for Permission to Communicate with Members of the Proposed Class, several erroneous statements must be corrected. The Plaintiffs indicate that the affected class members do not have the right to seek advice of attorneys. This is an inaccurate statement since the Court's order specifically allows "communications between an attorney and his client or a prospective client, who has on the *initiative of the client or prospective client* consulted with, employed or proposed to employ the attorney". Consequently, any member of the potential or actual class may *on his own initiative* consult with or seek the advice of any attorney. The Plaintiffs request to distribute the proposed leaflet is just another attempt on their part to make unqualified statements regarding the purposes and effects of this lawsuit to unsophisticated black employees whose rights have been protected by the combined efforts of two Federal Agencies. Furthermore,

all potential class members in this case received a copy of the Court's order which informed them that they may communicate with an attorney concerning this case if they take the initiative to contact that attorney.

With reference to Gulf's previous statement that the affected employees should be able to "make their own independent decisions concerning the acceptance of the back pay award", the Plaintiffs state that it appears "imminently proper" that before such "independent decisions" can be made, black workers and their counsel should be allowed to communicate. It is abundantly clear to Gulf and it should be abundantly clear to the Plaintiffs in this case that the Court's order does not prevent anyone from communicating with their counsel. Gulf does not understand why the Plaintiffs continue to raise this issue when the issue has been covered by the express terms of the Court's order.

The Plaintiffs state that Gulf will communicate with all potential class members since it will be sending a "notice" extending an offer of back pay on the condition that an employee execute, within 45 days, a release which would waive all the employee's claims against Gulf. It goes without saying that the notice to which the Plaintiffs refer was one ordered to be sent by the Court under signature of the Clerk of Court to the potential class members. Gulf has not sent notices of the potential class members. Gulf is bound by the terms of the Court's order just as are the Plaintiffs. Gulf has no greater right or no lesser right to communicate with potential class members than do the Plaintiffs and their counsel.

CONCLUSION

For the reasons stated herein, Plaintiffs' Motion for Permission to Communicate with Members of the Proposed Class should be denied.

[Signatures Omitted in printing]

[Certificate of Service Omitted in printing]

AMENDED COMPLAINT

[Caption Omitted in Printing]

I.

NATURE OF CLAIM

1. This is a proceeding for declaratory and preliminary injunctive relief and for damages to redress the deprivation of rights secured to plaintiffs and members of the class they represent by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981.

II.

JURISDICTION

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1343 (4), 42 U.S.C. § 2000e-5(f), 2201 and 2202, this being a suit in equity authorized and instituted pursuant to the Civil Rights Act of 1866, 42 U.S.C. § 1981, and 1964, 42 U.S.C. §§ 2000e *et seq.* The jurisdiction of this Court is invoked to secure the protection of and to redress deprivation of rights secured by (a) 42 U.S.C. §§ 2000e *et seq.*, providing for injunctive and other relief against discrimination in employment on the basis of race and (b) 42 U.S.C. § 1981 providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States.

III.

CLASS ACTION

3. Plaintiffs bring this action on their own behalf,

and pursuant to Rule 23 (b) (2) of the Federal Rules of Civil Procedure as a class action on behalf of those similarly situated. The members of the class and/or subclasses represented by plaintiffs are: (a) all black employees employed by defendant Gulf Oil Company in Port Arthur, Texas; (b) all black employees formerly employed by Gulf Oil Company in Port Arthur, Texas; and (c) all black applicants for employment at Gulf Oil Company who have been rejected for employment at said company. The requirements of the Federal Rules are met in that:

a. The members of the class are so numerous that joinder of all members would be impracticable. There are, for example, more than 300 blacks employed by Gulf Oil Company in Port Arthur, Texas;

b. There are questions of law and fact common to the class. It is alleged herein that defendants have discriminated against virtually every black employed by Gulf Oil Company in respect to the terms and conditions of their employment;

c. The claims of the plaintiffs are typical of the claims of the class and/or subclasses;

d. The plaintiffs will fairly and adequately protect the interests of the classes and subclasses. The interests of the plaintiffs are identical or similar to those of the class members;

e. The defendants have acted and refused to act on grounds generally applicable to the class and subclasses, thereby making appropriate final injunctive and declaratory relief with respect to all members of the classes;

f. The questions of law and fact common to the members of the class and subclasses predominate over questions affecting only individual members; a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

IV.

PLAINTIFFS

4. Plaintiff Wesley P. Bernard is a black citizen of the United States and Port Arthur, Texas. Plaintiff Bernard has been employed at Gulf Oil Company since October 2, 1946. He was hired as a laborer and is presently a boilermaker, having worked at various "helper" positions during his employment at Gulf Oil Company.

6. Plaintiff Hence Brown, Jr., is a black citizen of the United States and Port Arthur, Texas. Plaintiff Brown was hired as a laborer in 1954 and presently works as a truck driver.

7. Plaintiff Willie Whitley is a black citizen of the United States and Port Arthur, Texas. He was hired in 1946 as a laborer and retired in October, 1975, as a utility man, a classification slightly above a laborer classification.

8. Plaintiff Rodney Tizeno is a black citizen of the United States and Port Arthur, Texas. Plaintiff Tizeno was hired originally as a laborer and is presently a craftsman at Gulf Oil Company.

9. Plaintiff Willie Johnson is a black citizen of the United States and Port Arthur, Texas. Plaintiff Johnson was hired as a laborer at Gulf Oil Company.

V.

DEFENDANTS

10. Defendant Gulf Oil Company in Port Arthur, Texas (hereinafter simply Gulf Oil) is a corporation incorporated and/or doing business in the State of Texas. It operates and maintains a manufacturing plant in Port Arthur, Texas which produces a variety of oil and petroleum products and by-products. Gulf Oil is a corporation engaged in interstate commerce, employing more than fifteen persons, and is an employer within the meaning of 42 U.S.C. §§ 2000e-(b).

11. Defendant Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23 and Oil, Chemical, and Atomic Workers International Union are recognized as the exclusive bargaining representatives of operating and maintenance employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions and terms of employment. Local Union No. 4-23 and the Oil, Chemical, Atomic Workers International Union are labor organizations within the meaning of 42 U.S.C. § 2000e-(d), (e).

VI.

STATEMENT OF FACTS

12. Black employees of Gulf Oil are, and have in the past, been victims of systematic racial discrimination by defendants Gulf Oil and Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23. Prior and subsequent to July 2, 1965, Gulf Oil engaged in policies, practices, customs and usages made unlawful

by Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*) and 42 U.S.C. § 1981 which discriminate or have the effect of discriminating against plaintiffs and the classes they represent because of their race and color.

13. The methods of discrimination include, but are not limited to, intentionally engaging in the following practices:

a. Hiring and Assignment: Gulf Oil unlawfully has assigned and continues to assign a disproportionately large number of black employees to the Company's lowest paying, least preferred, and more physically demanding jobs;

b. White employees are given preference in initial employment and job assignments by Gulf Oil. The company utilizes a battery of tests which discriminates or has the effect of discriminating against blacks in initial employment with the Company. In addition, Gulf Oil maintains a high school diploma requirement and, on information and belief, other pre-employment criteria which discriminate or have the effect of discriminating against black applicants. Because of discrimination in hiring and job assignment, a disproportionately large number of whites have been preferentially hired by Gulf Oil for higher paying jobs than blacks with substantially the same or better qualifications. Black employees are now, and have in the past, been paid less money for harder work under less desirable working conditions than their white counterparts;

c. The use of a pre-employment test battery is legally deficient in one or more of the following ways:

(1) it is not professionally developed; (2) it has little or no relationship to successful job performance; (3) it has little or no relationship to the job sought or applied for; (4) it exhibits a racial and cultural bias against blacks;

d. Defendant Company employs a disproportionately small number of blacks in permanent craft positions. Blacks have been historically excluded from higher paying craft positions by Gulf Oil;

e. Gulf Oil has failed and/or refused to promote black employees and "helpers" to journeymen positions, irrespective of their ability to perform the job or position sought.

f. As a result of the Company's racial promotion and upgrading practices, "black" lines of progression, job classifications and departments have been artificially established and developed with the result that blacks have been and are now confined to the lower-paying and less-preferred jobs than are their white counterparts;

g. Black employees have been denied training, access and exposure to craft positions and other instructions which are necessary to an upgrade or promotion. Blacks who perform the same or comparable work as whites are given unequal pay and compensation;

h. Gulf Oil discriminatorily assesses discipline and discharge against black employees for reasons which would not be grounds for discipline or discharge of whites in similar positions.

14. Defendant Oil, Chemical and Atomic Workers International Union, Local Union No. 4-23 has agreed to, acquiesced in or otherwise condoned the unlawful employment practices referred to in paragraphs VI (13) (a-h), *supra.*

VII.

EXHAUSTION OF REMEDIES

15. Neither the State of Texas nor the City of Port Arthur has a law prohibiting the unlawful practices herein alleged.

16. All jurisdictional prerequisites to this action have been satisfied. This action is timely commenced under both 42 U.S.C. §§ 2000e *et seq.*, and 42 U.S.C. § 1981.

a. Plaintiff Wesley P. Bernard filed Charge No. AU7-6-535 with the Houston Equal Opportunity Commission District Office on June 24, 1967. His Notice of Right to Sue, attached to the Complaint as Exhibit A was issued on June 11, 1976.

b. Plaintiff Hence Brown, Jr. filed Charge No. AU7-6-540 with the Houston Equal Employment Opportunity Commission District Office on June 24, 1967. His Notice of Right To Sue, attached hereto as Exhibit B, was issued on June 11, 1976.

VIII.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs and the classes represented pray as follows:

A. That this Court formally determine, pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, that this action is maintainable on behalf of the class and/or subclasses described in paragraph III (3), *supra*.

B. That this Court issues affirmative relief as follows:

a. that Gulf Oil be required to institute an active recruitment policy;

2. That Gulf Oil be required to canvass the qualifications of all its black employees with the goal to promote all such qualified employees and to eliminate all present effects of past racial discrimination with the following provisions:

a. that plaintiffs and the classes be afforded full utilization of company seniority in bidding for or seeking better paying and more desirable jobs;

b. restructuring lines of progression, revision of applicable residency requirements, advanced level entry, and job skipping at Gulf Oil Company;

c. training and other assistance as necessary to enable the plaintiffs and the class to overcome the effects of past discrimination;

d. an award of back pay to each plaintiff and class member for any financial losses suffered by plaintiffs and the classes and which are attributable to acts of racial discrimination complained of herein;

e. rate protection sufficient to assure that black employees will not be economically discouraged, prevented or penalized in their efforts to attain their rightful place in Gulf Oil's employment structure;

f. prospective red circling to alleviate the residual effects of any racial discrimination not corrected or completely removed by this action;

g. Gulf Oil be required to suspend the use of any and all tests or other criteria for promotion or for initial employment until said tests or criteria are validated in accordance with the Equal Employment Opportunity Commission Guidelines on Testing;

h. that the defendant Union, Local 4-23, be required to file all grievances of its black members of Gulf Oil;

i. enter a declaratory judgment that the acts and practices complained of are in violation of the laws of the United States;

j. that plaintiffs and the classes they represent be awarded their complete costs of this action, including a reasonable attorneys' fees pursuant to 42 U.S.C. § 2000e-5(k);

k. grant plaintiffs and the classes they represent such other and further relief as may be necessary and proper.

[Signatures Omitted in Printing]

[Certificate of Service Omitted in Printing]

NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

Exhibit "A"

[Caption Omitted in Printing]

Pursuant to Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, you are hereby notified that you may, within ninety (90) days of receipt of this communication, institute a civil action in the appropriate Federal District Court. If you are unable to retain a lawyer, the Federal District Court, in its discretion, may appoint a lawyer to represent you and to authorize commencement of the suit without payment of fees, costs, or security. If you decide to institute suit and find you need assistance, you may take this notice, along with any correspondence you have received from the Commission, to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

HERBERT C. McCLEES,
District Director
Equal Employment Opportunity Commission

June 11, 1976
Date

NOTICE OF RIGHT TO SUE WITHIN 90 DAYS

Exhibit "B"

[Caption Omitted in Printing]

Pursuant to Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, you are hereby notified that you may, within ninety (90) days of receipt of this communication, institute a civil action in the appropriate Federal District Court. If you are unable to retain a lawyer, the Federal District Court, in its discretion, may appoint a lawyer to represent you and to authorize commencement of the suit without payment of fees, costs, or security. If you decide to institute suit and find you need assistance, you may take this notice, along with any correspondence you have received from the Commission, to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

HERBERT C. McCLEES, June 11, 1976
District Director Date
Equal Employment Opportunity Commission

ORDER

[Caption Omitted in Printing]

Filed August 10, 1976

Having considered Plaintiffs' Motion for Permission to Communicate with the Proposed Class:

IT IS ORDERED that the Motion is hereby denied.

JOE J. FISHER
United States District Judge

REPORT TO THE COURT BY GULF OIL CORPORATION OF INDIVIDUALS WHO HAVE ACCEPTED BENEFITS UNDER THE CONCILIATION AGREEMENT

[Caption Omitted in Printing]

Filed September 2, 1976

Pursuant to paragraph (9) of the Court's Order dated June 22, 1976, Gulf Oil Corporation, hereinafter referred to as "Gulf", hereby makes this report to inform the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who hve refused or failed to respond. The Conciliation Agreement referred to is that entered into on April 14, 1976, between the Equal Employment Opportunity Commission, the Office for Equal Opportunity and Gulf.

In accordance with paragraph (4) of the Court's Order dated June 22, 1976, Gulf delivered a notice to the Clerk of Court for mailing to all employees of Gulf at its Port Arthur Refinery who were covered by the Conciliation Agreement and who had not signed receipts and releases for back pay awards thereunder informing them that they had 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court. The notice from the Clerk of Court was dated June 30, 1976, and was mailed to all individuals entitled to benefits under the Conciliation Agreement who had not previously

signed receipts and releases. The notice was not sent to female employees or heirs of deceased employees who were entitled to benefits under the Conciliation Agreement because they were not actual or potential members of the proposed class as defined by the Complaint in this suit.

Attached hereto as Exhibit A is a list of individuals who have accepted the benefits of the Conciliation Agreement by signing receipts and releases indicating their acceptance.

Attached hereto as Exhibit B is a list of individuals who are entitled to benefits under the Conciliation Agreement and who have failed to accept those benefits by signing receipts and releases.

[Signatures Omitted in Printing]

[Certificate of Service Omitted in Printing]

EXHIBIT A

Employees' Names

1. Herman M. Alexander
2. Willie Brent
3. Raymond J. Fisk
4. Joe A. Hill
5. Isaac Linden, Jr.
6. Joseph E. Londow
7. Robert Londow
8. Chester A. Vital
9. Earl L. Williams
10. Elcide Davis
11. Clarence Adams
12. Silas Addison
13. Donald Albert
14. Joseph Alexander, Jr.
15. Ivory J. Alexis
16. Abraham Allen
17. Vincent J. Allen
18. John N. Alpough
19. Thaddeus Alpough
20. Theoudile Alpough
21. John Amy
22. Henry Andrepont
23. Francis Andrus
24. Clayton Antoine
25. Dalton Antoine
26. Kermit W. Baker
27. Reginald H. Baker
28. John C. Batiste
29. John Beard
30. L. P. Beckett
31. Clarence Bell
32. Willis Boatman
33. Joseph Bobb, Jr.
34. Oscar W. Boudreaux, Jr.
35. James A. Bowden
36. Harry C. Bradley
37. Herman Bray
38. Manuel Breaux
39. Orren Brew
40. Abraham Briscoe, Jr.
41. Jesse J. Brooks
42. Hence H. Brown
43. James C. Bryant
44. Thomas R. Bryant
45. Irvin Buckner
46. Bernard Bush
47. Gilbert Cannon
48. Edgar Chambers
49. Junius Chaney
50. Arthur Charles, Jr.
51. Henen Charles
52. Louis Chillow, Jr.
53. Eddie Christentary
54. James Clark
55. Cornelius Collins
56. Earnest Collins
57. James Collins

58. Launy Collins
59. Rodney Collins
60. Joshua Comeaux
61. John Conner
62. Leroy Conner
63. Henry Cosey
64. Jessie Davis
65. Junius M. Day
66. Morris D. Deese
67. James Diggles
68. Lloyd Dixon
69. Vivian Dumas
70. Johnnie Dunn
71. Oscar M. Dwin
72. Ervin Edwards
73. Robert Edwards
74. Willie Edwards, Jr.
75. Lee V. Eli
76. John Ellas, Jr.
77. Louis Esbry, Jr.
78. Lonnie Eulian
79. Amos J. Evans
80. Tony Evans
81. Theado Felder
82. Fred B. Field
83. Shelton Fontenot
84. Herbert J. Fontnette
85. Ed Foreman
86. Jesse C. Foreman
87. Percy Forward
88. Lyles J. Francis
89. Raymond Freddye
90. Philip Frelot
91. Manuel Gasper
92. Irving Gerard
93. Wilbert Getwood
94. Abraham L. Gilbert
95. Curtis L. Gill
96. Lee A. Giron, Jr.
97. Clifton Glasper
98. Willie Glover
99. Paul Goings, Jr.
100. James W. Gordon
101. Ray Gordon
102. Ruby Gordon
103. Rufus Granger
104. Leroy Grant
105. Thomas J. Green
106. Lawrence L. Gregoire
107. Allen Griffin, Jr.
108. Johnny Guice
109. Jean D. Guidry
110. Isaac Gunner
111. Lionel Gunner
112. Edward Hall
113. James Hammond
114. Amos Harris
115. Anderson Harrison
116. Alfred T. Hawkins, Jr.
117. Henry Haynes
118. Samuel Heath
119. Lloyd J. Hebert
120. Berkley A. Henderson
121. Lenton B. Henderson
122. Waldore W. Henderson
123. John C. Hennington

124. Harrison Hill
125. F. E. Hollins
126. Alex Hubbard
127. Willie Hughes
128. Joseph Huston
129. Welby Ina
130. Carey Ivory
131. Lawrence Jackson
132. Ernest Jacobs
133. Furbin M. Jacobs
134. Phillip L. Jacquet
135. Joseph H. Jefferson
136. Leroy Jenkins
137. Alfred Joe, Jr.
138. Cleveland Johnson
139. Mitchell Johnson
140. Odell Johnson
141. Thomas Johnson, Jr.
142. William Johnson
143. McZeal Joiner
144. Hardiness Jones
145. Lee T. Jones
146. Willie Jones
147. Eddie Joseph, Jr.
148. Warren Joseph
149. Wilford Julien
150. James Keller
151. James Keller
152. Lawrence LaFleur
153. Joseph O. Landry
154. Sterling Landry
155. Johnnie Langford
156. Robert L. Lavergne
157. Milton Lavine
158. Arthur Lawrence
159. Shelby Lee
160. Clarence Lendon
161. Joseph L. Lewis
162. Eddell Lightfoot
163. Earl Linton
164. Norris Louviere
165. Thomas D. Luse
166. Louis J. Lyons
167. Willard Lyons
168. Eugene Maden
169. Howard Mader
170. Damon Magadeny
171. Frederick W. Malbrue
172. Warren Marks
173. Joseph W. Marsh
174. Morris Martin
175. Edmond Matthews
176. John McClenon
177. Robert McCree, Jr.
178. Herbert A. Mearlon
179. Allen Miles
180. Thomas Miles
181. Isaac Miller
182. Lemon Miller
183. Jasharia Minard
184. Willington Mingo
185. Arnesta A. Mitchell
186. Joseph J. Mitchell
187. Lumos K. Mitchell
188. Eddie C. Monroe, Jr.
189. Robert L. Mosley

190. Clarence Moss
191. Earnest M. Newman
192. Elton Nickles
193. Clifton Nurse
194. Leo Oderbert
195. Delard Parker
196. Henry Parker
197. Willie Parker
198. Hamilton Paul
199. James R. Paul
200. Landry Pete
201. Wilson Phillips
202. Murphy J. Pickney
203. Oliver Plumbar
204. Royal Posey
205. Isaac Prejean
206. Sidney Prevost
207. Lawrence Prince
208. Wallace Ransom
209. Norman Ratcliff
210. Wilson Ratcliff
211. Adam Reado
212. Arthur Reado
213. Charlie Reynolds
214. Henry Robertson
215. Arthur Robinson
216. Charlie Robinson
217. Jessie Rogers
218. Leroy Ross, Jr.
219. Wm. T. Sanderson, Jr.
220. Lester Seales
221. Lawrence Sharffet
222. Murray Shedrick
223. George Shields, Jr.
224. Warren Simmons
225. Elster Simon
226. Lee Simon
227. Roosevelt Simon
228. Clifton Sinegal
229. Cleveland Sinegal
230. Frank Smith
231. Henry Smith
232. Lloyd Smith
233. Wilbur Smith
234. Oguster Snowden
235. Leonard Sostand
236. Hillery Starks, Jr.
237. Joseph A. Stelley
238. Ransom S. Strawder
239. Cornelius N. Taylor
240. Israel Taylor
241. Joseph Theall
242. John B. Thibodeaux
243. Alphonse Thomas
244. Levy Thomas
245. Landry Thomas
246. Roland Thomas
247. Joseph R. Thompson
248. Fred Trice
249. Herman Turner
250. Sterling Turner, Jr.
251. William Vaughn
252. Freddie Veltz
253. James Walker
254. James Wallace
255. Louis J. Warrick

256. David Washington, Jr.
257. Jimmie Washington
258. James C. Washington
259. Paul C. Washington
260. James D. Watts
261. Fred Welch
262. James W. West, Jr.
263. Chester Whitley
264. Chrystal Wide
265. Clarence A. Williams
266. Calvin H. Williams
267. Ervin Williams, Jr.
268. George Williams, Jr.
269. Henry Williams
270. Lawrence C. Williams
271. L. V. Williams
272. Robert Williams
273. Walter Williams, Jr.
274. Columbus Wilson
275. Lester Wycoff
276. Jeff Alfred
277. Joe M. Allen
278. Burvin Anderson
279. Herman Anderson
280. James Bailey, Jr.
281. Sam Baker
282. Walter Ballard
283. Roosevelt Batiste
284. Otis J. Beasley
285. Upshy Bell
286. Henry Bessard
287. Sherman Beverly
288. Joe Bob
289. Ken R. Bonnie
290. Parker Botley
291. Frank I. Boutte
292. Clarence Bridges
293. Vinson Briscoe
294. Clarence Broussard
295. Paul D. Broussard
296. Herman Brown
297. Willie Bryant
298. Wilton Bryant
299. Burnell Buchanan
300. Rawlin G. Bush
301. Willie D. Bush
302. Willie Campbell
303. Freddie Carter
304. Fred D. Carter
305. Willie Charles
306. Joseph L. Clark
307. Lawrence Clayton
308. Frank H. Coleman
309. Van Coleman
310. Irvin Collins
311. Milton Collins, Jr.
312. Willie R. Collins
313. Ellis Comeaux
314. Freddie Comeaux
315. Leander Como
316. Clarence Conner
317. Gussie Cooks
318. Willie Cross
319. Isiah Daniel
320. Sampson Daniel
321. Hillard David

322. Cleveland Demartha
323. George Douglas
324. Willie Douglas
325. Louis Dugas
326. Clovis Duhon
327. Paul Duhon
328. Charlie Dupree
329. Ernest H. Edwards
330. Price Edwards
331. Lester Elmore
332. Wilbur T. Eugene
333. Frank Fennis
334. Allen Filer
335. Bennie Francis
336. Junius J. Francis
337. Morris Francis
338. Roy Francis
339. Wilford Francis
340. Germain Francois
341. Antewine Franklin
342. Norman Frelow
343. Lee A. Giron
344. Mose Gistand
345. Willie Gloston
346. William Gobart
347. Timothy Jones
348. Talmage Jones
349. Roy Joseph
350. Lawrence Keal
351. Ora L. Landry
352. Joseph F. Langlinais
353. Charley Lee, Jr.
354. Robert Lee
355. Albert Lewis
356. John Lewis
357. James Lewis
358. Joseph Lewis
359. Paul Lewis
360. Domingue Londow
361. Albert Malvaux
362. Willie Marks
363. Dock Martin
364. Mose Martin
365. Ervin McGee
366. Ernest M. Miller
367. Frank Mills
368. James F. Moore
369. Curtis Morris
370. Lloyd Gordon
371. Rayfield Gordon
372. Lee Gradney
373. Adam Granger, Jr.
374. Nathan Granger
375. David Green
376. Morris Guidry
377. Whitney Guidry
378. Willie Hall
379. George Hardeman
380. Washington N. Harrison
381. Lemon Harmon
382. Ormes Heath
383. Albera Henry
384. Joseph Hill
385. Leroy Horton
386. Albert Jacko

387. Rufus Jenefor
388. Glancy Johnson
389. Stanford Johnson
390. Wesley Johnson
391. Willie Johnson
392. Zedekiah Johnson
393. Albert Jones
394. Claude Jones
395. Sylvester Jones
396. Burges Morrow
397 Dempsey Morrow
398. Moses Mouton
399. Robert B. Mouton
400. Henry Nezy
401. George Ogletree
402. Charles Olivier
403. Eddie Pierre
404. Hannable Pierre
405. Jean Pierre
406. Calvan Polite
407. Leo Randall
408. Homer Richard, Jr.
409. Martin Richard
410. Prevol Rideau
411. Granville Robinson
412. Joe Rogers
413. Harry Ruffin
414. Preston Sampson
415. Paul Scipion
416. C. Arch Seale
417. Leo Segura
418. Charlie Shaw
419. Isaac Shedrick
450. Isaiah Washington
421. Stanley Sias
422. Aaron Simmons
423. Leon Simon
424. Bob Simpson
425. Prejean Sinegal
426. June Smith
427. Burnis Solomon
428. Fred Stephenson
429. Effery A. Syers
430. John Syers
431. Preston Syers
432. Lee Thomas
433. Arthur Thompson
434. James T. Thornton
435. James Towers
436. Renard Trahan
437. O. D. Trainer
438. Aron Van Wright
439. Hamilton Viltz
440. Murphy N. Vital
441. Philmore Vorise
442. Joseph D. Wagner
443. Harold Walker
444. Sherman Walker
445. Ralph F. Walters
446. Steven Walters
447. Frank Ward
448. Burnes Washington
449. Dennis Washington
450. Isaih Washington
451. Willie Washington
452. Marcus J. B. Watkins

553. Overton West
554. Emery White
555. Sidney White
556. Cravin Williams
557. Clifton Williams
558. Lawrence Williams
559. Oran Williams
560. Tom Williams
561. Curtis R. Wilson
562. O. B. Windon
563. David Worthy
564. Raymond J. Rose
565. Jessie R. Sparks
566. Theodore R. Sanderson*

* The release was received on 8/25/76, 12:47 p.m., but it was not processed because of the Court's Order.

EXHIBIT B

Employees' Names

1. Joseph Starring
2. Russel Abbs
3. Howard Adams
4. Edward Benjamin, Jr.
5. Irvin Bob
6. Vernon D. Booker
7. Glen Branch
8. Cuthers Broaden
9. Hamilton Carmouche
10. Lawrence Carriere
11. Herman Carter
12. Joseph Castille
13. Anthony Clark
14. Daniel Clark
15. Willie Conway
16. Squire Crawford
17. John Francis
18. Isaiah Frank
19. Raymond J. Gilbert
20. Robert Gordon
21. Acy Graham
22. Haywood Green
23. Clyde Harrington
24. Thomas J. Harris
25. Fred H. Hudson
26. Illinois W. Johnson
27. Fred Jones
28. Frank Jones
29. Leroy Jones
30. Willie Jones, Jr.
31. Clarence Kennerson
32. David A. McKenzie
33. Lee Medford
34. George Melancon
35. James R. Newman, Jr.
36. Carley Sam
37. William Santee
38. Joseph W. Saulsberry
39. Willie L. Scott
40. Ollie J. Smith
41. Albert Sweet
42. Herman Walker
43. Freddie White
44. Alphe Williams, Jr.
45. Dennis Williams
46. Earl Williams
47. Howard Martin
48. Ora Queen
49. Anton Amy
50. Leroy Bell
51. John B. Burrell
52. Willie Johnson
53. Earl Nelson
54. Joseph Parker, Jr.
55. Rodnel Senegal
56. Arthur Skillman
57. Willis Smith
58. Wesley Vories
59. Frank Webb
60. Spencer Abron, Jr.

61. Wesley P. Bernard
62. Hence Brown, Jr.
63. John Duhon
64. Thomas Flanagan, Jr.
65. Joseph P. Jacquet
66. Elton Hayes
67. Rodney Tizeno
68. Willie Whitley

ORDER

[Caption Omitted in Printing]

[Filed January 11, 1977]

BE IT REMEMBERED that on this day came on for consideration the Motion to Dismiss of defendant Gulf Oil Company [Gulf], joined in by the defendant Oil, Chemical and Atomic Workers International Union and Local Union No. 4-23 [Unions]. After proper notice to the parties by an Order of this Court, the Motion to Dismiss is to be treated under Rule 56, F.R.Civ.P., because the defendants offered, and the Court accepted evidence extrinsic to the pleadings in the form of affadavits. The parties were allowed more than 10 days to submit any additional pertinent information. Taking into consideration all material presented by the parties prior and subsequent to the decision to treat the Motion as one for summary judgment, the Court must conclude that the Motion is well taken and should be granted in all particulars.

While it is not necesary that all members of a class bring a charge with the Equal Employment Opportunity Commission [EEOC] as a prerequisite to joining as coplaintiff in litigation, *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968), the class representatives must show that they have complied with the required preliminary administrative steps and timely filed suit in this Court. *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973). At this stage in the history of Title VII litigation, it goes without saying that a plaintiff who seeks to represent a class may not bring

suit in District Court until he has filed a complaint with the EEOC. 42 U.S.C. § 2000e-5(f) (1974).

The affidavits submitted reveal that neither of the plaintiffs Elton Hayes, Sr., nor Rodney Tizeno has filed a complaint with the EEOC with regard to a discrimination charge against Gulf or the Unions. Thus neither Hayes nor Tizeno may maintain suit in their own right, *Love v. Pulman Co.*, 404 U.S. 522 (1972); *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), and therefore could not adequately represent a class. Rule 23(a), F.R.Civ.P.

Of course this failing should not prevent maintenance of the Title VII portion of this suit as a class action if others of the named plaintiffs have satisfied the jurisdictional requirements and could raise a viable claim here. Unfortunately this is not the case.

Title VII requires that suit be instituted in the District Court within 90 days after notice from the EEOC that

> * * * the Commission has not filed a civil action under this section * * * *or* the Commission has not entered into a conciliation agreement to which the person aggrieved is a party. (emphasis supplied). 42 U.S.C. § 2000e-5(f)(1).

Plaintiffs Willie Johnson, Sr., Wesley Bernard, and Hence Brown received such notice from the EEOC on February 26, 1975, after it was sent the previous day. Plaintiff Willie Whitley's failure of conciliation letter was sent December 4, 1973. The mailing of these letters began the running of the 90 day period for filing a civil action

on the associated claim, under the clear language of the statute set out above.

Unfortunately the EEOC had adopted a troublesome two letter procedure whereby after sending the failure of conciliation notice, it would later issue a "right to sue" letter at the complainant's request. The first letter, however, advised the claimant that he should contact an attorney or request assistance from the EEOC in doing so prior to the issuance of the "right to sue" letter and prepare for suit if desired. The two letter system was entirely a figment of the imagination of the EEOC, since it is not mandated or suggested by 42 U.S.C. § 2000e-5(f). As is ably pointed out by Gulf in its brief, the events which trigger notice are listed in the disjunctive so that the occurrence of any one of the listed events (such as failure of conciliation) and subsequent notice thereof empowers the claimant with the right to bring action in this Court. To hold that the 90 day period did not begin to run until after the claimant requests and receives the second letter would amount to allowing him unlimited discretion in choosing a time for filing suit.

The leading decision to the contrary, *Tuft v. McDonnell Douglas Corporation,* 517 F.2d 1301 (8th Cir. 1975), has not been followed in this Circuit. *See Turner v. Texas Instruments, Inc.,* 401 F.Supp. 1179 (N.D. Texas 1975); *Kelley v. Southern Products,* Civ. No. 19243 (N.D. Georgia 1975); *Barfield v. A.R.C. Security, Inc.,* 9 E.P.D. ¶ 10,136 (N.D. Georgia 1975). Judge Porter's decision in *Turner v. Texas Instruments, Inc., supra,* is most persuasive in its examination of 42 U.S.C. § 2000e-5(f), its legislative intent, and cases decided thereunder. His analysis of the erroneous rationale em-

ployed in cases supporting the two letter system, and the fact that jurisdiction must be construed strictly, *Genovese v. Shell Oil Co.*, 488 F.2d 84 (5th Cir. 1973), convinces this Court that the 90 day period for filing suit begins when the notice of failure of conciliation is sent by the EEOC.

Since this cause was not filed until May 18, 1976, more than 90 days had elapsed from the sending of the failure of conciliation notice by the EEOC. The Title VII claim must be dismised.

Plaintiffs' secondly assert a cause of action under 42 U.S.C. § 1981. Since the claim was the subject of complaints filed with the EEOC in 1967 by three of the plaintiffs, nine years had elapsed before court action on it was initiated. Since the plaintiffs allowed more than two years to run before filing suit, and because the filing of an EEOC complaint does not toll the limitation period, *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), any cause of action under § 1981 is barred and must be dismised. Tex. Rev. Civ. Stat. Ann. art. 5526(4). Defendants' reasoning is convincing that all plaintiffs complain of the identical pattern of discrimination which was the subject of the Bernard, Brown and Johnson EEOC complaint, which pattern has long since been eliminated. Thus, any claim by Tizeno, Hayes and Whitley must be dismissed along with that of Bernard, Brown and Johnson. The Court additionally finds no circumstances of continuous discrimination that would justify application of the principles discussed in *Williams v. Norfolk & Western Railroad Co.*, 530 F.2d 539, 542 4th Cir. 1975); *Johnson v. Railway Express Agency, supra* at

467 n. 13; and *Briggs v. Brown & Williamson Tobacco Co.*, 414 F. Supp. 371, 378 (E.D. Va. 1976).

The Court also acknowledges a most compelling argument for the application of the equitable doctrine of laches in this particular case, based not only on the obvious lack of diligence on the part of the plaintiffs, but a recognition that to put this defendant to the task of obtaining records and locating witnesses after the expiration of such a lengthy period would pose a particularly onerous burden. *Afro-American Patrolmens League v. Duck,* 503 F.2d 294, 299 (6th Cir. 1974). In this regard see the affidavit of C. B. Draper, made a part of the record on October 15, 1976. It is accordingly

ORDERED, ADJUDGED and DECREED that summary judgment be and the same is hereby granted for the defendants in this cause, as to both the class action and any individual claims of discrimination by the plaintiffs.

RENDERED this the 11th day of January, 1977.

/s/ JOE J. FISHER
Joe J. Fisher
U. S. Chief District Judge

Wesley P. BERNARD et al.,
Plaintiffs-Appellants,

v.

GULF OIL COMPANY et al,
Defendants-Appellees.

No. 77-1502.

United States Court of Appeals,
Fifth Circuit.

June 15, 1979.

Employment discrimination suit was brought against employer and unions based on allegation that the employer and the unions had discriminated against plaintiffs and similarly situated black employees in violation of Title VII and of the Civil Rights Act of 1866. The United States District Court for the Eastern District of Texas, Joe J. Fisher, Chief Judge, entered an order prohibiting the parties from communicating with class members without court approval and later granted defendants' motions for summary judgment. Plaintiffs appealed, and the Court of Appeals, Thornberry, Circuit Judge, held that: (1) the 90-day period within which plaintiffs were required to file suit did not begin to run until plaintiffs received notice from the Equal Employment Opportunity Commission both of the failure of conciliation and of the EEOC's decision not to sue; (2) defendants did not meet their summary judgment burden to establish the absence of any material issue of fact; (3) under both Texas and federal law, the date on which the statute of limitations began to run on plaintiffs' claim under the Civil Rights Act of

1866 was the last date on which defendants unlawfully harmed plaintiffs; (4) plaintiffs could recover damages for any wrongful acts committed during the limitations period; (5) the statute of limitations did not totally bar the claim under the Civil Rights Act of 1866; (6) any recovery under the Civil Rights Act of 1866 was limited to those violations occurring within a two-year period immediately preceding the filing of the complaint or thereafter; (7) plaintiffs' failure to file their Title VII claim until completion of the EEOC process was not inexcusable delay and did not support the application of laches to bar the claim; (8) the order restricting the parties' communication with members of the putative class was a permissible exercise of the district court's discretionary power to control a class action, and (9) the order did not violate plaintiffs' constitutional rights.

Reversed and remanded.

Godbold, Circuit Judge, concurred in part and dissented in part and filed opinion.

James C. Hill, Circuit Judge, specially concurred and filed opinion.

Stella M. Morrison, Port Arthur, Tex., Ulysses Gene Thibodeaux, Lake Charles, La., Charles E. Cotton, New Orleans, La., Barry L. Goldstein, Washington, D.C., Jack Greenberg, Patrick O. Patterson, New York City, for plaintiffs-appellants.

William H. Ng, Atty., Abner W. Sibal, Gen. Counsel, Joseph T. Eddins, Jr., Assoc. Gen. Counsel, Charles L. Reischel, Asst. Gen. Counsel, Equal Employment Oppor-

tunity Commission, Washington, D. C., for E.E.O.C., amicus curiae.

Joseph H. Sperry, Wm. G. Duck, Kathleen M. Civins, Susan R. Sewell, U. S. Jones, Houston, Tex., for Gulf Oil.

Carl A. Parker, Michael D. Murphy, Port Arthur, Tex., for Oil, Chemical & Atomic Workers, Etc.

Appeal from the United States District Court for the Eastern District of Texas.

Before THORNBERRY, GODBOLD and HILL, Circuit Judges.

THORNBERRY, Circuit Judge:

Plaintiffs-appellants in this case are present or retired employees of defendant Gulf and claim that Gulf and the defendant unions have discriminated against plaintiffs and similarly situated black employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. The district court entered an order prohibiting the parties from communicating with class members and later granted defendants' motions for summary judgment.

Plaintiffs Bernard, Brown, and Johnson filed charges of discrimination with the EEOC in 1967 against Gulf and the local union.[1] The EEOC served copies of the

1. Bernard also filed charges against the international union in 1976, but the EEOC dismissed this charge as untimely. Apparently, this was the only charge any of the plaintiffs filed against the international union. Although these facts may have some relevance to the merits of the action or scope of relief against the international union, the parties did not discuss that possibility before this court. Therefore, although the district court may decide differently after further examination on remand, on this appeal we will discuss the issues raised as if they were equally applicable to all defendants.

charge on defendants in August, 1967, and issued a finding of reasonable cause in August, 1968. The EEOC actively pursued conciliation efforts with defendants until February, 1975, at which time it sent plaintiffs a notice stating that defendants did not wish to entertain conciliation discussions and advising plaintiffs that they could request a "Notice of Right to Sue" letter at any time.[2] The EEOC continued conciliation efforts on the basis of a Commissioner's charge filed in September 1967, which raised the same issues charged by plaintiffs. These efforts resulted in a conciliation agreement between the EEOC and Gulf in April, 1976. Plaintiffs filed this suit in May, 1976, and requested the Right-to-Sue letters from the EEOC. The EEOC issued the letters to Bernard and Brown in June,[3] and plaintiffs amended their complaint to reflect this fact in July, 1976.

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2. These first letters stated:
On February 19, 1975, the Equal Employment Opportunity Commission's Houston District Office received notice from Gulf Oil Company—U.S. and Oil, Chemical and Atomic Workers, International Union Local 4-23, the Respondents in the above captioned matter, that they do not wish to entertain conciliation discussions to resolve those issues set out under the Commission's Decision as issued on August 15, 1968. You are hereby notified that you may request a "Notice of Right to Sue" from this office at any time. If you so request, the notice will be issued, and you will have ninety (90) days from the date of its receipt to file suit in Federal District Court.
It is advisable that, if you wish to pursue this matter further, you have an attorney ready to proceed with the case prior to issuance of the Notice of Right to Sue. If you do not have an attorney and you wish to proceed in Federal District Court with your case, then call this office for assistance in securing private legal counsel.

3. The Right-to-Sue letters stated:
NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS
Pursuant to Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, you are hereby notified that you may,

Soon after they filed the complaint, plaintiffs' attorneys appeared at a meeting of Gulf employees, during which they discussed this case. As a result of this meeting, Gulf requested the court to enter an order restricting the parties' or counsels' communication with class members. Gulf accompanied this request with an unsworn assertion that plaintiffs' attorneys had told the employees at the meeting it would be against their interest to accept the back pay award offered pursuant to the conciliation agreement. Plaintiffs' attorneys adamantly denied that they had urged the employees to reject the conciliation agreement. The court granted Gulf's motion without making any findings.[4] Defendants then moved to dismiss the complaint. In November, 1976, the court ordered that the motion be treated as a motion for summary judgment, and granted summary judgment for defendants in January, 1977. Plaintiffs raise four issues on this appeal.

I.

[1] The district judge dismissed plaintiffs' Title VII claim because plaintiffs failed to file suit within 90 days of receiving the first letter, which stated that conciliation efforts had failed and that plaintiffs could request a

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within ninety (90) days of receipt of this communication, institute a civil action in the appropriate Federal District Court. If you are unable to retain a lawyer, the Federal District Court, in its discretion, may appoint a lawyer to represent you and to authorize commencement of the suit without payment of fees, costs, or security. If you decide to institute suit and find you need assistance, you may take this notice, along with any correspondence you have received from the Commission, to the Clerk of the Federal District Court nearest to the place where the alleged discrimination occurred, and request that a Federal District Judge appoint counsel to represent you.

4. This order is set out in footnote 9, *infra*.

Notice-of-Right-to-Sue letter. The judge held "that the 90 day period for filing suit begins when the notice of failure of conciliation is sent by the EEOC." Since the trial court opinion in this case, however, this court has held differently. In *Zambuto v. American Tel. & Tel. Co.*, 544 F.2d 1333 (5 Cir. 1977), a panel of this circuit noted that the statute imposing the 90 day limitation could be read to begin the 90 day period on receipt of a notice that the EEOC has either failed to file a civil action or has not arrived at a conciliation agreement. That court stated, however, that the limitations period does not begin to run until the EEOC has notified the claimant "of both the failure of conciliation and the EEOC's decision not to sue in order to indicate clearly that the administrative process has been completed." *Id.* at 1335. *Accord Turner v. Texas Instruments, Inc.*, 556 F.2d 1349 (5 Cir. 1977); *Page v. U.S. Indus, Inc.*, 556 F.2d 346 (5 Cir. 1977), *cert. denied.*, 434 U.S. 1045, 98 S.Ct. 890, 54 L.Ed.2d 796 (1978). Furthermore, the *Zambuto* panel held that the final paragraph of the initial letter infomed Mrs. Zambuto that "the EEOC was awaiting [her] request for issuance of a right-to-sue letter. Implicit in this latter statement is the assurance that the 90 day period would not commence until this letter was requested and dispatched. Because this paragraph declared that further administrative action was contemplated by EEOC, it failed to furnish Mrs. Zambuto (or AT&T) with the form of notice required under § 2000e-5(f)(1) to start the 90 day period for filing suit." 544 F.2d at 1335. Because the two-letter procedure allowed the claimant to postpone filing suit, the *Zambuto* panel declared the procedure invalid. Because the use and wording of the two letters was "patently misleading," however, that panel made its ruling prospective only.

[2] At oral argument, defendants conceded that the present case is directly controlled by *Zambuto* and the cases following it. Plaintiffs filed suit before the *Zambuto* decision, and the letters plaintiffs received are indistinguishable from those involved in *Zambuto, Page* and *Turner.* As in *Turner* and *Page,* the first letter plaintiffs received informed them only that conciliation efforts had failed; it did not indicate that the EEOC had decided not to sue. Also, as in *Page* and *Zambuto,* the concluding paragraph of the first letter assured plaintiffs that the 90 day period would not commence until plaintiffs received the second letter. Because the letters to the plaintiffs in this case were as "patently misleading" as those in prior cases, the 90 day period for filing suit did not begin until receipt of the second letter. Plaintiffs filed suit within this period. Therefore, the district court erred in dismissing the individual Title VII claims of Bernard and Brown. Also, because the claims of these class representatives are properly before the court, the district court erred in dismissing the class claims and the claims of the other named plaintiffs who did not file a complaint with the EEOC. *Wheeler v. American Home Prod.,* 563 F.2d 1233 (5 Cir. 1977); *Oatis v. Crown Zellerbach Corp.,* 398 F.2d 496 (5 Cir. 1968).

II.

The district judge also granted summary judgment in favor of defendants on plaintiffs' § 1981 claim. The trial judge found that plaintiffs' complaint alleged only "the identical pattern of discrimination which was the subject of the Bernard, Brown and Johnson EEOC complaint, which pattern has long since been eliminated." In addition, the court found as a fact that there were no continuing acts of discrimination.

[3-5] Defendants make two arguments in support of this holding. First they assert that the trial court properly granted summary judgment in their favor because plaintiffs failed to respond properly to defendants' summary judgment motion Plaintiffs assert that defendants have discriminated in the past and presently continue to discriminate against blacks in hiring, assignment, promotion, training, recruiting, discipline, and discharge. Defendants argue that "appellants wholly failed to offer factual support for their assertions." Defendants-appellees brief at 18. Defendants misunderstand the summary judgment practice. Under Fed.R.Civ.P. 56, the moving party has the initial burden of proving that there is no genuine issue of material fact. If the movant wishes to dispute the allegations of the complaint, he must do so through affidavits, documents, or other evidence. Unless and until the movant initially provides factual support for the summary judgment motion, the opposing party has no duty to respond to the motion or to present opposing evidence. *Boazman v. Economics Lab., Inc.*, 537 F.2d 210 (5 Cir. 1976). In the present case, defendants presented a great number of affidavits with their summary judgment motion, but in none of the affidavits did defendants deny that they are discriminating against blacks. Therefore, the trial judge's ruling that there were no instances of continuing discrimination was unsupported by the summary judgment record. Defendants, as the parties requesting summary judgment, failed to meet their burden of showing the absence of any material issue of fact.

[6-8] Defendants also argue that even if the facts plaintiffs allege are true, we must dismiss plaintiffs' § 1981 claim. In support of this contention, defendants argue primarily that the applicable statute of limitations is that

provided by Tex. Rev. Civ. Stat. Ann. art. 5526, *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1379 (5 Cir. 1974), and that under Texas law, the statute of limitations begins to run when the elements necessary for the cause of action first coalesce, regardless of whether defendants later commit other acts of the same nature. Under defendants' theory, the statute of limitations would have expired on plaintiffs' claim two years after defendants began discriminating against blacks, even if defendants continued such discrimination to the time plaintiffs filed this action. This argument is frivolous. Under both Texas and federal law, the relevant date for the purposes of the statute of limitations is the *last* date on which defendants improperly harmed plaintiffs. Furthermore, plaintiffs may collect damages for any wrongful acts defendants committed within the limitations period. *E.g., Marlowe v. Fisher Body*, 489 F.2d 1057, 1063 (6 Cir. 1973); *Macklin v. Spector Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 77, 478 F.2d 979, 987 (1973); *United States v. Georgia Power Co.*, 474 F.2d 906, 924 (5 Cir. 1973); *Alexander & Polley Const. Co. v. Spain*, 477 S.W.2d 301 (Tex. Civ. App.—Tyler 1972 no writ); *Goldman v. Ramsay*, 62 S.W.2d 176 (Tex. Civ. App.—Texarkana 1933 error dism'd). Defendants' reliance on *Kittrell v. City of Rockwall*, 526 F.2d 715 (5 Cir.), *cert. denied*, 426 U.S. 925, 96 S.Ct. 2636, 49 L. Ed.2d 379 (1976), is unfounded. That case turned on the rule, peculiar to trespass cases, that the statute of limitations begins to run on the date when the trespassers first entered the land, even if they continue to use the land after that date. *Baker v. City of Fort Worth*, 146 Tex. 600, 210 S.W.2d 564 (1948). This rule cannot be applied when defendants, as in this case, continue to violate plaintiffs' rights with new and distinct actions.

[9] Therefore, the district judge erred in holding that the statute of limitations totally barred plaintiffs' § 1981 claim. Plaintiffs' cause of action and any recovery they may receive, however, must be limited to those violations occurring within the two year period immediately preceding the filing of the complaint or thereafter.

III.

In addition to holding that statutes of limitations barred plaintiffs' claims, the district court "acknowledge[d] a most compelling argument for the equitable doctrine of laches in this particular case. . . ." Because we disagree with the court's ruling on the legal defenses, we find it necessary to discuss this alternative theory in support of the judgment below. *Lowe v. Pate Stevedoring Co.*, 558 F.2d 769, 770 n.2 (5 Cir. 1977).

[10] In *Franks v. Bowman Transp. Co.*, 495 F.2d 398, 406 (5 Cir. 1974), *rev'd on other grds.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), this court held that the doctrine of laches is applicable to Title VII and § 1981 actions brought by private plaintiffs, even if the legal limitations periods have not run. To apply laches in a particular case, the court must find both that the plaintiff delayed inexcusably in bringing the suit and that this delay unduly prejudiced defendants. *Save Our Wetlands, Inc. v. U.S. Army Corps of Engineers*, 549 F.2d 1021, 1026 (5 Cir.), *cert. denied*, 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977). We conclude that the evidence before the Court on this summary judgment motion does not allow a finding that either of these elements exists.[5]

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5. Which party has the burden of proof on the issues of laches is somewhat unclear. *See* G. Gilmore & C. Black, The Law of Admiralty 771-76 (2d ed. 1975); *Law v. Royal Palm Beach Colony,*

Defendants argue that plaintiffs were aware of their cause of action at least as early as 1967 when they filed their initial charges against defendants with the EEOC. They also assert that plaintiffs could have requested a Notice of Right to Sue from the EEOC and filed a private action in 1970. 35 Fed. Reg. 10006 (June 18, 1970) (currently at 29 C.F.R. 1601.256(1977)). Defendants therefore argue that plaintiffs' failure to file a complaint with the district court until 1976 "shows conclusively that they have slept on their rights." Defendants-appellees' brief at 28. The only justification plaintiffs offer for this nine-year delay in filing suit is their asserted right to await the completion of the EEOC administrative process. The issue before us, therefore, is whether plaintiffs' failure to file a private action until after the termination of the EEOC's active, continuing administrative process is unreasonable.

The Supreme Court in *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977), discussed a similar issue. The employer-defendant in *Occidental Life* claimed that either federal or state statutes barred the EEOC from initiating suit more than three years after a claimant had filed a charge with the EEOC. In language particularly applicable to the present case, the Court indicated: "When Congress first enacted Title VII in 1964 it selected '[c]ooperation and voluntary compliance . . . as the preferred means for achieving' the goal of equality of employment opportunities." *Id.*, 97

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578 F.2d 98, 101 (5 Cir. 1978); *Wheat v. Hall*, 535 F.2d 874, 876 (5 Cir. 1976). The determination is complicated by the fact that the question has arisen most often in admiralty cases, which may not be entirely controlling in the present case. We find it unnecessary to decide this issue, however, because the facts as presented on this summary judgment motion, without more, do not allow a finding of laches.

S.Ct. at 2455. A legislative analysis of the 1972 amendments to Title VII is similar:

> It is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC or the Attorney General, as appropriate. However, as the individual's right to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief.

118 Cong. Rec. 7565 (1972).

[11, 12]) These statements clearly indicate that the private remedy allowed by 42 U.S.C. § 2000e-5(f)(1) is only an alternative method for a plaintiff to obtain relief from discrimination. A plaintiff cannot be penalized for choosing to forgo this alternative and electing instead the legislatively and judicially favored method of relying on the administrative processes of the EEOC.[6] We therefore hold that plaintiffs' failure to file their Title VII claim until completion of the EEOC process was not inexcusable delay and could not support the application of laches.

[13] Plaintiffs' § 1981 claim is in a slightly different posture. We have already decided that the state statute of limitations prevents plaintiffs from asserting claims arising more than two years before the filing of the com-

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6. As stated in *Sangster v. United Air Lines*, 438 F.Supp. 1221 (N.D. Cal. 1977):

> Mrs. Sangster's reliance on the EEOC to conciliate her dispute with United cannot be characterized as lack of diligence on her part in view of the strong federal policy favoring such reliance. She cannot be found chargeable with neglect which would bar her right to bring this action when, trusting in the good offices and promise of her government to seek resolution of her complaint, she commits that grievance to its care.

plaint. Therefore, any delay occurring before that period is irrelevant to the § 1981 claim. Defendnts have not alleged that plaintiffs delayed inexcusably in asserting the claims arising within those two years. Therefore, it is unnecessary for us to consider whether laches could be invoked to bar those claims arising within the legal limitations period.

[14, 15] We also conclude that, on the evidence presented, any prejudice suffered by defendants was caused not by plaintiffs' delay but by defendants' own actions. In the only affidavit supporting this element of defendants' summary judgment motion, the personnel director of Gulf indicated that since the date when plaintiffs allege the violations began, defendant Gulf has made several personnel changes, a number of management personnel have retired, and two personnel managers have deceased. These statements are insufficient grounds on which to base a finding of prejudice, The fact that there have been personnel changes or that employees have retired is irrelevant unless those employees are unavailable. *Akers v. State Marine Lines, Inc.*, 344 F.2d 217, 221 (5 Cir. 1965).

[16, 17] The affidavit does not indicate that two former personnel managers have died and that those employees' knowledge is irreplaceable. Gulf asserts the live testimony of these employees is necessary, however, only because it has destroyed the written records of the personnel decisions made from 1965 through 1974. Defendants argue that they cannot now adequately defend against plaintiffs' charges without reference to these destroyed records. The EEOC informed defendants of the charges in 1967. Pursuant to its normal document reten-

tion plan, Gulf retained documents for only four years. Thus, Gulf did not destroy the documents relevant to the claims arising in 1965 until 1969, two years after Gulf learned of the charges. A party cannot assert the defense of laches merely because it has failed to preserve evidence despite knowledge of a pending claim. *Ameircan Marine Corp. v. Citizens Cas. Co.*, 447 F.2d 1328 (5 Cir. 1971).[7] This rule is of even greater validity in this case than in most. Since 1966, the EEOC has maitained a regulation prohibiting those charged with Title VII violations from destroying records relevant to the charge. 31 Fed. Reg. 2833 (Feb. 17, 1966) (currently at 29 C.F.R. 1602.14 (1977). Therefore, defendants' argument that plaintiffs' delay prejudiced defendants is without merit. Insofar as defendants have been prejudiced, the evidence before the court shows that defendants' own negligence

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7. The concluding statements of the Supreme Court in *Occidental Life* are again relevant:

> The absence of inflexible time limitations on the bringing of lawsuits will not, as the company asserts, deprive defendants in Title VII civil actions of fundamental fairness or subject them to the surprise and prejudice that can result from the prosecution of stale claims. Unlike the litigant in a private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of an enforcement suit within 10 days after a charge has been filed. This prompt notice serves, as Congress intended, to give him an opportunity to gather and preserve evidence in anticipation of a court action.
>
> Moreover, during the pendency of EEOC administrative proceedings, a potential defendant is kept informed of the progress of the action. Regulations promulgated by the EEOC require that the charged party be promptly notified when a determination of reasonable cause has been made, 29 CFR § 1601.19b(b), and when the EEOC has terminated its efforts to conciliate a dispute, *id.*, §§ 1601.23, 1601.25.

97 S.Ct. at 2458.

and disregard of EEOC regulations caused the prejudice.[8] We conclude that the present facts do not allow findings of either unreasonable delay or prejudice. Therefore the doctrine of laches is inapplicable.

IV.

[18] Because we are remanding this case for further action it is necessary that we consider the propriety of an order the district judge entered restricting the parties' communication with the members of the putative class. Judge Steger, in Chief Judge Fisher's absence, originally entered an order generally prohibiting all communication without exception. Chief Judge Fisher later modified the order. It is of this later order that plaintiffs complain on appeal. The modified order was explicitly modeled on those suggested by the Federal Judicial Center in the Manual for Complex Litigation, Part 2, § 1.41 (1977).[9]

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8. Defendants admit that plaintiffs' § 1981 claims are nearly identical to their Title VII claims. Defendants could therefore disprove the claims with the same evidence. Since the EEOC regulations required defendants to maintain all records relevant to the Title VII claims, defendants could not have been prejudiced with respect to either Title VII or § 1981.

9. The order provided:

IT IS ORDERED:

(1) That Gulf's motion to modify Judge Steger's Order dated May 28, 1976 is granted;

(2) That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:

In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all adressees and with a motion and proposed order for prior approval by this Court of the proposed

Plaintiffs argue that the order was improper for several reasons. First, they assert that it is inconsistent with the

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communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F. R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public officc or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication, file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Conciliation Agreement dated April 14, 1976, between Gulf, the U.S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior; That the private settlement of charges that the employer has violated Title VII is to be encouraged, *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

policies of Rule 23 of the Federal Rules of Civil Procedure and therefore beyond the powers of the district court. We reject that argument and hold that the order was a permissible exercise of the trial court's discretionary power in controlling a class action.

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(4) That the Clerk of the Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix I;

(6) That Gulf bear the expense of mailing the notice and a copy of the Court's order to the individuals covered by item (4) above;

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

It is Plaintiff's contention that any such provisions as hereinbefore stated that limit communication with potential class members are constitutionally invalid, citing *Rodgers v. United States Steel Corporation,* 508 F.2d 152 (3rd Cir. 1975), *cert. denied,* 420 U.S. 969, 95 S.Ct. 1386, 43 L.Ed.2d 649 (1975). This Court finds that the *Rodgers* case is inapplicable, and that this order comports with the requisites set out in the *Manual for Complex Litigation,* Section 1.41, p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court.

As one noted treatise states:

> Because class actions tend to be extremely complicated and protracted, their management and disposition frequently require the exercise of considerable judicial control and ingenuity in the framing of orders relating to various aspects of the case. Rule 23(d) provides the trial court with extensive discretion in achieving this objective and offers some guidance as to the types of problems the district judge is likely to encounter.

7A C. Wright & A. Miller, Federal Practice & Procedure § 1791 at 193 (1972).[10]

[19-21] We believe the trial judge could have easily concluded that his interest in and duty of controlling the suit in this manner outweighed any interest plaintiffs' attorneys may have in communicating with members of the putative class without the prior approval of the court. Rule 23 imposes on the trial judge the duty of assuring that a class action is an appropriate way to resolve the controversy, the representative parties will fairly and adequately protect the interests of the class, the pleading and trial of the case is conducted fairly and efficiently, and any settlement or compromise is not unfavorable to the class.[11] The present order could be helpful in exercising

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10. *See In Re Air Crash Disaster at Florida Everglades,* 549 F.2d 1006, 1012 n. 8 (5 Cir. 1977): "In class actions we recognize, indeed insist upon, the court's participation as the manager of the case."

11. Thus, although in the ordinary non-class suit, restrictions such as those in the present case might be entered in the form of a temporary injunction and only after relatively strict scrutiny of specific criteria, the drafters of the Rules felt that the trial judge needed broader powers with respect to class actions and specially imbued the district court with more extensive authority to control the suit.

many of these duties, especially those of assuring fairness and efficiency. Any communication between the parties and class members may mislead the class members by appearing to reflect the opinion of the court rather than that of the party making the communication. This danger exists "simply because of references to the title of the court, the style of the action, the name of the judge, and to official processes." Manual for Complex Litigation, Part 1, § 1.41 at 27 (C. Wright & A. Miller ed. 1977). The trial court should therefore have the power to examine any communication in order to assure that class members will not be misled in this manner. Even apart from any references to the court, communications to potential class members by the parties may unfairly represent facts or issues relevant to the action. When those communications are sent during a limited period in which class members may opt out of the class, or, as here, in which they may accept a back pay offer pursuant to a conciliation agreement, any misleading statement may be irreparable. The trial judge may also believe that requiring prior approval of communications will reduce the risk of the class members becoming confused by an avalanche of notices, inquiries, and arguments directed to them by each of the parties to this action. Thus, there are many substantial reasons a trial judge may believe that an order such as that suggested in the Manual for Complex Litigation is justified.[12]

12. The Manual enumerates other potential abuses that may justify the use of such an order, for example: solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action; and solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action. Arguably these concerns are not significant in this case in which the potential class is represented by a non-profit organization whose fees are not paid directly by the class members.

Plaintiffs assert their interests outweigh these concerns of the trial judge. Plaintiffs argue that to conduct the action adequately they must be allowed to contact class members in order both to discover their case and to inform class members of their civil rights. They allege that the order prevents them from performing those functions. This is not true; the order only prohibits contact with class members without prior approval of the court. Therefore, only plaintiffs' interest in *unrestrained* communications is to be balanced against the court's interests in requiring court approval of all communications sent to class members.

[22-24] Plaintiffs' ability to discover their case is in no way reduced by the requirement that the court approve any contact. It is expected that the trial judge will exercise "minimal judicial control of these communications . . ." and freely allow discovery. Manual for Complex Litigation, Part 1, § 1.41 at 29 (C. Wright & A. Miller ed. 1977). The trial judge should refuse to allow only those attempts at discovery that would clearly affect the fairness or efficiency of the litigation adversely. Plaintiffs have not shown that this "minimal control" would prejudice them in any way. Therefore, we do not believe plaintiffs have any significant interest in seeking discovery without the prior approval of the court. Similarly, to the extent that Rule 23 implicitly provides plaintiffs with a right to "encourag[e] common participation in the litigation of [plaintiffs' race] discrimination claim," *Coles v. Marsh,* 560 F.2d 186, 189 (3 Cir.), *cert. denied sub nom., Blue Cross v. Marsh,* 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977), the same rule's explicit grant of authority to the trial court to control the conduct and settlement of the action outweighs plaintiffs' right.

Therefore, although there may be other methods of achieving similar results,[13] Rule 23 does not prohibit a trial court's discretionary use of an order requiring prior approval of communications with class members.[14]

[25] Plaintiffs next argue that the order is an unconstitutional prior restraint on their communication with the class and is especially egregious in this case in which plaintiffs are represented by an organization highly regarded as an effective opponent of discrimination. This argument is considered and rejected in the recent revision of the Manual for Complex Litigation, Part 1, § 1.41 at 1-3 (C. Wright & A. Miller ed. 1978 Cum. Supp.) and in *Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782 (E.D. La. 1977). We find it unnecessary, however, to decide whether the interests discussed above would also justify the prior restraint of any constitutionally protected communication. The order in the present case, unlike those in *Rodgers v. United States Steel Corp.*, 508 F.2d 152 (3 Cir.), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975), *Waldo* or the Manual, explicitly

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13. *Compare* Developments in the Law-Class Actions, 89 Harv. L. Rev. 1281, 1601-04 (1976), *with Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782, 792 n. 10 (E.D. La. 1977).

14. Because the trial judge made no findings of fact concerning plaintiffs' attorneys' alleged improprieties, the allegations are irrelevant to our decision. We hold that the trial judge had the power to restrict communications without regard to any allegations of unethical conduct. This holding is necessary because many of the dangers of abuse and irreparable harm discussed above can arise without warning. Requiring the district court to find specific evidence of the dangers in a particular case before acting would severely hamper its ability to control the case. In many instances, the abuses must not merely be punished, but must be prevented. This can be accomplished only if the trial judge can order the restrictions before the abuses have materialized.

exempts communications that a party or counsel asserts are constitutionally protected from prior restraint.

[26] Despite this provision, plaintiffs argue that the order chills their free exercise of protected activities because they can never be certain that the district court will agree with their assertion that the communication is protected.[15] As an example of such a disagreement, plaintiffs rely on an incident in the trial court. Plaintiffs submitted a document to the court for approval asserting that it was constitutionally protected. The judge refused to allow plaintiffs to send the document to the class members. Plaintiffs argue that if they had sent the document without submitting it they may have been subject to a contempt order. This argument is without merit. The exemption applies when the parties make any communication they *assert* is protected, not merely when the trial judge agrees with that assertion. Thus, as long as a party or counsel makes any unapproved contact with class members in the good faith belief that the contact is constitutionally shielded, he may not be punished for violating the court's order. Once plaintiffs submitted the proposed communication to the district judge, however, the exemption for communications they asserted were constitutionally protected was no longer relevant. At that point the issue became whether the Constitution, in fact, protected the communication rather than whether the plaintiffs had distributed it in the good faith belief that it was constitutionally protected. Plaintiffs have not argued on appeal that the trial judge erred in deciding that he

15. *See* Note, 88 Harv. L. Rev. 1911, 1922 n. 74 (1975): The "proviso exempting constitutionaliy-protected communication does not eliminate—indeed it highlights—the overbreadth and resultant chilling effect of the Manual's proposed rule."

could properly prohibit the distribution of that particular document nor have they alleged his determination was untimely. They have alluded to the incident only as an example of the alleged "chill" the order prohibiting unapproved communication placed on the exercise of their first amendment rights, notwithstanding the exception for communications they asserted to be constitutionally protected. Therefore, we need not decide whether the judge properly prohibited dissemination of this particular notice after plaintiffs submitted it for his approval. We note, however, that even though the prohibition on unapproved communications is permissible, the judge's separate decisions approving or disapproving particular communications would normally be proper subjects for appellate review.

[27] We conclude that the present order adequately safeguards the first amendment rights of the parties and counsel because even if the prohibitions of the order are vague or overbroad, the parties can avoid them if they assert a good faith belief that a particular communication is constitutionally protected. *Cf. Screws v. United States,* 325 U.S. 91, 101-02, 65 S.Ct. 1031, 1035-36, 89 L.Ed. 1495 (1945): "the requirement of specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid."

[28] Plaintiffs' final contention is that the order violates their right to equal protection of the laws. This claim is based on the assertion that the order allows defendant to offer back pay settlements to the class members and to contact class members in the ordinary course of defendants' business without allowing plaintiffs similar

rights. This argument is invalid because it is based on an incorrect reading of the order. The order prohibits defendants as well as plaintiffs from contacting the class members regarding back pay settlements. Rather than allowing further contact by either party, it directs the court clerk to distribute a notice to class members informing them that they have 45 days within which to accept the back pay award to which they are entitled under the conciliation agreement negotiated by the EEOC and directs them not to accept the award if they wish to participate in any recovery secured by plaintiffs in this action. Further, the provision allowing communication with class members in the regular course of business applies equally to all parties and counsel, not merely to defendants. It could be argued that allowing contact in the regular course of business would tend to favor defendants in practice because of their greater day-to-day contact with the employees. Any management discussion of the merits of the suit with class members, however, would not be in the regular course of business. Therefore, although defendants may have greater day-to-day contact with the class members, the order does not allow defendants any greater freedom than plaintiffs in discussing the suit with class members.

We therefore conclude that the district court's order of June 22, 1976, is a permissible exercise of the court's power to control class action litigation and is prohibited by neither the first nor fifth amendments to the Constitution.

The judgment of the district court is REVERSED and the case REMANDED for proceedings consistent with this opinion.

GODBOLD, Circuit Judge, concurring in part, and dissenting in part:

I concur in Parts I through III of the majority opinion. I dissent from Part IV, which upholds the validity of the district court's order restricting communications by named parties and their counsel with any actual or potential class member not a formal party.

The issue is important. The critical part of the order in question follows the form suggested in the Manual for Complex Litigation, 1977 ed., Pt. 2, § 1.41.[1] This case presents in this circuit for the first time the validity of such an order. Another circuit has taken a position contrary to the majority's decision.[2]

In other cases I have vigorously asserted the power of the district court to manage class actions and other complex cases.[3] But, in my opinion, the restraints imposed in this case contravene Rule 23, F.R.Civ.P., and violate freedom of speech and freedom of association as guaranteed by our Constitution.

I. *The history*

Understanding the issues requires a more complete history than the brief statement made by the majority. In

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1. Sample Pretrial Order No. 15. The suggested form is a reprint of a pretrial order entered by the District Court for the Western District of Missouri. *Manual*, Pt. 2, § 1.41 n.33.

2. *Coles v. Marsh*, 560 F.2d 186 (CA 3), *cert. denied*, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977). *See also Rodgers v. United States Steel Corp.*, 508 F.2d 152 (CA 3), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975).

3. *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1012 & n.8 (CA 5, 1977); *Huff v. N. D. Cass Co.*, 485 F.2d 710, 712-13 (CA 5, 1973) (en banc).

April 1976 Gulf and EEOC entered into a conciliation agreement covering alleged racial discrimination by Gulf against black employees at its Port Arthur, Texas plant, pursuant to which Gulf agreed to cease alleged discriminatory practices, establish an affirmative action program, and offer back pay to alleged discriminatees, ranging, for various employees and various periods, between $2.81 per month of service and $5.62 per month of service. The affected employees were not parties to the agreement. Gulf agreed to notify affected employees of the back pay agreed upon; failure of the employee to respond would be regarded as acceptance. According to Gulf, back pay was offered to 614 present and former black employees of the Port Arthur plant.[4]

In May 1976, while implementation of the conciliation agreement was in progress, six present or retired black employees of the Port Arthur plant brought this class suit, under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, on behalf of black employees, black former employees of the plant, and black applicants rejected for employment with Gulf Oil Company (not limited to the Port Arthur plant). Plaintiffs were represented by Stella Morrison, of Port Arthur, Charles E. Cotton, of New Orleans, and three New York attorneys from the NAACP Legal Defense and Education Fund, Jack Greenberg, Barry L. Goldstein and Ulysses Gene Thibodeaux. Plaintiffs asked injunctive and declaratory relief and damages. The defendants are Gulf and the Oil, Chemical and Atomic Workers' Union. Plaintiffs charged that Gulf discriminated against blacks in hiring and job assignments, employed discriminatory tests, paid

4. And 29 female employees.

unequal pay, employed racially tainted promotion and progression practices, denied training to blacks, refused seniority to blacks, and discriminatorily discharged and disciplined blacks. They alleged that the union had agreed to, acquiesced in or condoned Gulf's discriminatory practices.

According to affidavits later filed by plaintiffs' counsel, a meeting of black employees who were members of the alleged class was held May 22 at the request of the named plaintiffs, plaintiffs' counsel were invited to attend, and some did attend. Gulf was served with process May 24. On May 27, before Gulf filed responsive pleadings, it filed a two-sentence, unsworn request that the court enter an order limiting communications by parties and their counsel with actual or potential class members. The motion was accompanied by an unsworn brief asserting that Ulysses Gene Thibodeaux, one of plaintiffs' attorneys, had recommended to actual and potential class members at a meeting that they not sign receipts and releases sent them pursuant to the conciliation agreement. Further, the brief said that it had been reported to Gulf that Thibodeaux advised the group that they should mail back to Gulf checks received pursuant to the conciliation agreement because he could recover twice as much for them by the pending suit. Gulf asserted in its brief that these actions violated standards imposed on attorneys by law and by the Canons of Ethics. It asserted that an order of the court was necessary to prevent further communication of the type alleged and that the statements by plaintiffs' attorney would prejudice its defense of the case and the conciliation efforts. In its brief Gulf said that when the summons was served on it approximately 452 of the 643 employees entitled to

back pay had received checks and executed general releases.

On May 28, after oral argument by the parties, District Judge Steger entered a temporary order effective until Chief Judge Fisher could return and assume control and administration of the case. His order is substantially the same as paragraph 2 of the modified order, which appears as note 9 of the majority opinion, that is, it contained the restraints without the exceptions. Judge Steger made no findings.

On June 8, Gulf filed an unverified motion to modify the temporary order to permit it to resume offering back pay awards and to receive receipts and releases, as provided by the conciliation agreement. Gulf added, again by an unsworn brief attached to its motion, a new allegation of misconduct by saying that it had been reported to Gulf that Thibodeaux had recommended to the persons at the meeting that even if an employee had signed a receipt and release he should return his check to Gulf. Gulf also filed an affidavit from EEOC stating that it felt the issues in this suit were "almost identical" to those embraced by the conciliation agreement.

Plaintiffs filed an unsworn responsive brief, squarely raising the constitutionality of the order and the district court's authority to issue it. Judge Fisher conducted a hearing on June 10 and allowed time for additional briefs. With their next brief plaintiffs filed affidavits by Thibodeaux, Morrison and Goldstein, covering several points. Thibodeaux denied that he advised potential class members not to accept Gulf's offer of settlement and denied that he stated that plaintiffs' counsel could get employees twice as much back pay by suit. According to the

affidavits, none of the lawyers accepted or expected compensation from the named plaintiffs or any additional named plaintiffs or from members of the class; the only anticipated compensation was by attorneys' fees awarded by the court against the defendants, and in the case of the LDF attorneys any fees awarded them would be paid over to LDF. The affidavits also set out that it was necessary for plaintiffs and their counsel to communicate with members of the proposed class to investigate systematic and individual racial discrimination, complete discovery, and define issues in the case, and that, because of the back pay offers made by Gulf under the conciliation agreement, it was of crucial importance that plaintiffs' attorneys be able to inform class members of their rights and answer their questions and concerns. In their brief, plaintiffs asserted that many of the issues (specifying several of them) encompassed by the suit were not included within the matters covered by the conciliation agreement.

On June 22, without requiring Gulf to verify its charges of improper and unethical conduct by Thibodeaux, and without making findings of fact, Judge Fisher entered the modified order. He rejected plaintiffs' contention that the order was constitutionally invalid.

I turn to the contents of the modified order. Its opening language is plenary in form. I discuss below the exceptions that appear further on in the order.

The persons enjoined are "all parties hereto and their counsel."[5]

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5. The majority refer several times to the order's restricting communication *by the parties*. Elsewhere they refer to the interests of *plaintiffs' attorneys* in communicating with putative class members. The order bars both named parties and counsel.

The subject matter forbidden is communications "concerning [this] action . . . without the consent and approval of the proposed communication and proposed addressees by order of this court." More specific communications which the proscription includes, but is not limited to, are: (a) solicitation of legal representation of potential and actual class members not formal parties; (b) solicitation of fees and expenses; (c) solicitation of requests by class members to opt out; (d) "communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice."

The means of communication forbidden are "directly or indirectly, orally or in writing."

The persons with whom communication is forbidden are potential and actual class members.

The second subparagraph of ¶ (2) sets out exceptions as provided in the *Manual's* suggested form: communications between attorney and client, and attorney and prospective client when initiated by the prospective client, and communications in the regular course of business. The third subparagraph of ¶ (2) is the "constitutional right" exception:

> If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in

writing, or an accurate and substantially complete summary of the communication if oral.

In the modified order Judge Fisher added to the *Manual's* proposed form a provision that the clerk mail a notice to employees covered by the conciliation agreement stating that they had 45 days in which to accept Gulf's offer and that all who delivered receipts and releases within 55 days would be deemed to have accepted. See ¶ (4) and ¶ (9) of the order. In ¶ (8) the court restated the restraints on communication that it had imposed in the earlier part of the order.

On July 6, pursuant to the "constitutional right" exception, plaintiffs moved for permission for themselves and their counsel to communicate with members of the proposed class. They attached the following notice which they proposed to distribute and asserted that they were constitutionally entitled to distribute it:

Illustration to follow.

ATTENTION
BLACK WORKERS
OF GULF OIL

The Company has asked you to sign a release. If you do, you may be giving up very important civil rights. It is important that you fully understand what you are getting in return for the release. *IT IS IMPORTANT THAT YOU TALK TO A LAWYER BEFORE YOU SIGN*. These lawyers will talk to you *FOR FREE*:

STELLA M. MORRISON
440 Austin Avenue
Room 516
Port Arthur, Texas 77640
(713) 985-9358

BARRY L. GOLDSTEIN
ULYSSES GENE THIBODEAUX
10 Columbus Circle
Suite 2030
New York, New York 10019
(212) 586-8397

CHARLES E. COTTON
348 Baronne Street
Suite 500
New Orleans, Louisiana 70112
(504) 522-2133

These lawyers represent six of your fellow workers in a lawsuit titled *Bernard v. Gulf Oil Co.*, which was filed in Beamount Federal Court on behalf of all of you. This suit seeks to correct fully the alleged discriminatory practices of Gulf.

Even if you have already signed the release, talk to a lawyer. You may consult another attorney. If necessary, have him contact the above-named lawyers for more details. All discussions will be kept strictly confidential.

AGAIN, IT IS IMPORTANT THAT YOU TALK TO A LAWYER. Whatever your decision might be, we will continue to vigorously prosecute this lawsuit in order to correct all the alleged discriminatory practices at Gulf Oil.

Plaintiffs alleged in their motion that neither Gulf's offer to employees nor the notice sent by the clerk explained the terms of the conciliation agreement. They asked the court to declare that the notice was constitutionally protected. They noted that under the "constitutional right" exception to the order they were entitled to distribute the notice and file it with the court within five days thereafter. However, because of what they considered to be the vagueness of the order, and "for reasons of prudence," the plaintiffs asked for the court's guidance. The reasons for asking guidance were not unreasonable. The first subparagraph of ¶ (2) of the order required that *any* proposed communication be presented in writing for prior approval. Paragraph (3) restated all the restraints. The "constitutional right" exception appeared to permit retrospective filing in place of prior court approval. But counsel already charged with unethical and illegal conduct cannot be faulted for electing not to gamble on their interpretation of the order or upon the possibility that if they sent the notice without preclearance the Court might find it not constitutionally protected and

their assertion of constitutional protection not made in good faith.[6] As it turned out, their prudence was justified because the court ultimately denied permission to send the notice.

The request for guidance from the court, filed July 6, was appropriate and respectful, and it deserved timely court action. To be effective the notice that plaintiffs proposed to send needed to be distributed promptly. The 45 days for acceptance of Gulf's offer, described in the Clerk's notice, expired on or about August 8. The court did not act on plaintiffs' motion until August 10, when it denied the motion by a one-sentence order without explanation.

II. Misuse of discretion

I believe that the court misused its discretion in entering the orders in this case.[7]

(1.) Non-compliance with Rule 23(d)

Rule 23(d) gives the following authority to the court:

> In the conduct of actions to which this rule applies, the court may make *appropriate* orders: . . . (3) imposing conditions on the representative parties. (Emphasis added.)

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6. *See Rodgers v. United States Steel*, 508 F.2d 152, 161 (CA 3), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975): "The attorneys for the plaintiffs, with appropriate caution, declined to test an ambiguous order by violating it and risking contempt."

7. The district court had not adopted a local rule concerning limiting communications in class actions. We are, therefore, not concerned with rule-making power but with the authority of the court, inherent or conferred by Congress through the Rules, to impose the limit on communications. The *Manual*, Pt. 2, § 1.41, contains a suggested local rule, an earlier version of which was held invalid in *Rodgers v. United States Steel, supra.*

This provision, added in 1966, gives the trial court "extensive power" to control the conduct of a class action. 7A C. Wright & A. Miller, Federal Practice and Procedure § 1791 (1972). There will be situations in which it will be "appropriate" for the court to restrict communications between counsel and potential class members. But, however, broad "appropriate" may be it is certainly no broader than the limits imposed by the Constitution, as discussed in Part III, below. Pretermitting constitutional limits, it seems to me that the district court must find that restrictions are "appropriate" upon a factual showing by the moving party that unsupervised communications between counsel and named plaintiffs on one hand and potential class members on the other have materialized into actual abuses of the class action device or that abuses are imminently threatened.[8] In this case, "appropriateness" was not proved and no finding of "appropriateness" was made by either district judge.

The only arguable grounds I perceive for the order's being "appropriate" are the unsworn statements by Gulf that were denied by plaintiffs' attorney under oath, the discussions in the *Manual* of possible abuses of class actions, and the existence of the conciliation agreement in the process of implementation.

With respect to the presence of plaintiffs' counsel at the meeting of employees, it seems to me singularly inappropriate for the district court to rely—if it did rely—

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8. The Third Circuit in *Coles v. Marsh*, 560 F.2d 186, 189 (CA 3), *cert. denied*, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977), discussed the validity of a similar order restraining communications in terms of the district court's power and held it invalid. Although I reach the same result as the *Coles* court, I think it is preferable to analyze the question in terms of the district court's discretion.

upon Gulf's representations that Thibodeaux made statements which violated both the law and the Canons of Ethics. Gulf never presented proof of this hearsay. Under oath, Thibodeaux denied making such statements.[9]

Nor should a judicial decision on "appropriateness" be rested upon the discussions in the *Manual.* With deference to the opinions of the distinguished Board of Editors concerning the possibility of abuses in class actions, a trial court should not merely presume that in the case before it—indeed in all class actions coming before it—abuses are either present or threatened.[10]

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9. In this appeal Gulf restates the hearsay as though it were fact proved and found. Also it throws in this alternative argument:

> By affidavit, one of the Appellants' attorneys admits to attending the discussions, but denies making any improper statements. Whether the statements, in fact, are true is immaterial since the admitted appearance by Appellants' attorneys at such a meeting provides the potential for abuse of the class action process which the Manual and Rule 23 seeks to prevent.

Br. p. 42. Counsel for Gulf treat more lightly charging an attorney with unethical and improper conduct than I would be willing to do.

10. The *Manual* cites *Weight Watchers of Philadelphia v. Weight Watchers International, Inc.*, 455 F.2d 770 (CA 2, 1972), as confirming an "almost unreviewable discretion" in trial courts to regulate communications between counsel and active and potential class members. *Weight Watchers* rests upon the unreviewability of discretionary orders by mandamus. The issue is before us by appeal. In *Rodgers,* the Third Circuit said:

> [T]he committee which drafted the *Manual* probably went too far in its apparent assumption that *Craig v. Harney,* [331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947)] and *Bridges v. California,* [314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941)] would permit the vesting of unreviewable discretion in a district court to impose a prior restraint on communication or association. 1 J. Moore, [Federal Practicce ¶ 1.41, at 29 n. 28, (2d ed. 1974, Part 2)].

508 F.2d at 165. *Rodgers* granted mandamus against use of a local rule then appearing in the *Manual* and since amended. I discuss in Part III, below, the consittutional limitations imposed by *Craig v. Harney* and *Bridges v. California.*

The order in this case was entered pursuant to the authority given the district court under Rule 23(d). That rule requires the district judge to exercise his discretion in making orders. He is only authorized to make "appropriate orders," and a determination of what is appropriate requires the exercise of discretion. What is appropriate for one case is inappropriate in another. If communications between counsel and actual and potential members of a class action were always abusive of the class action device then it would be appropriate to automatically enter an order restricting communications. Such communications, however, in many instances serve to effectuate the "purposes of Rule 23 by encouraging common participation in [a lawsuit]." *Coles v. Marsh, supra* at 189. The decision whether to restrict communications in a particular case, therefore, requires an inquiry into the likelihood of abuse and the potential for benefits. The *Manual's* general discussion of potential abuses flowing from unrestrained communications is no substitute for reasoned inquiry into the harms and benefits on the particular facts of each case. The rule requires no less.[11]

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11. In *Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782 (E.D. La. 1977), the district court rejected the claim that it exceeded its rule-making authority under Rule 83 by adopting its Local Rule 2.12(e), identical to the *Manual's* suggested Rule. The court concluded that "[t]he potential abuses attendant upon . . . unregulated communication clearly undermine the efficacy of the class action device." *Id.* at 794. The local rule was, therefore, consistent with the Federal Rules of Civil Procedure, the standard for judging the validity of a local rule. The difficulty with the district court's analysis is that Rule 2.12(e) applies to every case. It does not permit the district judge in an individual case the discretion to not restrict communications, although in some cases it would be inconsistent with the policies of the Federal Rules to restrict communication. A refined approach that does not sweep so broadly that it does away with the benefits of attorney-client contact and recognizes the interests that putative class members have in receiving

Here, at the appellate level, the majority grounds its decision on possibilities rather than actualities. It refers to what the parties "may do," to what the trial judge "could have easily concluded," how the order "could be helpful" to the judge in exercising his Rule 23 duties, to what the judge "may believe" and of how communications "may mislead." This is not the stuff of which judicial decisions are made.

The final potential justification for the court's order is the strong emphasis upon settlement of Title VII disputes by conciliation rather than in the courtroom. *U. S. v. Allegheny-Ludlum, Industries, Inc.*, 517 F.2d 826, 846 (CA 5, 1975). But, as we noted in *Allegheny-Ludlum*,

> the "final responsibility for enforcement of Title VII is vested with federal courts," . . . [T]he various legal remedies for employment discrimination are cumulative and complementary. From the grievant's standpoint, "[u]der some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true."

Id. at 848 & n.26 (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147, 156 (1974), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461, 95 S.Ct. 1716, 1720,

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communications is called for. The need for such an approach was recognized by District Judge Bue in his report accompanying the Southern District of Texas' amendments to its local rule restricting communications, discussed *infra*. Judge Bue's discussion focuses primarily on constitutional problems with the *Manual's* rule. A similar need for a narrow rule that successfully guards against abuses while not doing away with the benefits of communication is also required so that it does not run afoul of Rule 83's mandate that district courts adopt only local rules that are consistent with the policies of the Federal Rules.

44 L.Ed.2d 295, 302 (1975)). In *Rodriguez v. East Texas Motor Freight,* 505 F.2d 40 (CA 5, 1974), *vacated on other grounds,* 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), we commented on the possible divergence of governmental interests in remedying employment discrimination and the interests of the individuals who were the victims of discrimination:

> While the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution.

Id. at 66. The choice between the lawsuit and accepting Gulf's back pay offer and giving a general release was for each black employee to make. The court could not make it for him, nor should it freight his choice with restrictions that were not "appropriate" under the circumstances. Gulf had represented to the court that the conciliation agreement was fair and embraced substantially the same issues as the suit. But plaintiffs' counsel had represented that the conciliation agreement was seriously deficient; that on its face it neither made the black employees whole nor satisfied the dictates of Title VII; that the relief supplied was inadequate because the goals were statistically improper, there was no firm commitment to timetables, and there was no relief from illegal testing. Plaintiffs had set out other objections as well. According to plaintiffs, the notices sent out by Gulf did not even explain how back pay was computed.

The conclusion is inescapable that the court's limitation on communications was intended to further employees' accepting conciliation awards in preference to

participating in the suit.[12] Predetermining whether a court can ever appropriately do this, in this instance it could not, in deciding "appropriateness," elect to favor conciliation and frustrate or chill the right of black employees to choose the litigation route by cutting them off from talking with the named plaintiffs and with the only attorneys who had direct expertise about the suit.

The majority has failed to take into consideration the benefits flowing from communication between the parties and the potential class members. In racial discrimination cases group solidarity may be vital to trigger and to sustain the willingness to resort to legal remedies for the removal of discrimination, but the court order bars black plaintiffs from all communication with fellow blacks employed by Gulf concerning this case. The majority also does not give weight to the need and desire of potential class members for advice of counsel concerning back pay versus lawsuit. The order permits a potential class member to confer with attorneys for plaintiffs at the prospective class member's request. Pragmatically this is a dubious exception. A prospective class member must find out who the attorneys are and when and where to see them, but the actual class members are forbidden to give him this information—or any other information about the case—without prior court approval, nor can counsel furnish this information to potential class members generally.

The wide disparity between what was done here and normal judicial procedures is demonstrated by posing this

12. If not otherwise clear, the court's approach was made clear by its direct entry into the conciliation effort (discussed below), and its withholding action on plaintiffs' request for permission to send the proposed notice until after the time had expired for accepting back pay awards.

question: "What would have happened if Gulf had asked for a temporary injunction imposing the exact restrictions that were imposed in this case?" I believe that the court would have insisted upon requirements of notice, time limits, proof of likelihood of harm, the public interest and similar familiar requirements, and this court would have reviewed an injunction under the usual standards, especially since constitutional rights are involved.

The limitations I suggest do not diminish the significance of the potential problems seen by the draftsmen of the *Manual* and by the majority here. I would simply require a showing that the problems are real and not imaginary.

To the extent the majority bases its approval of the lower court's orders on the premise that it is always appropriate to restrict communications in class actions, that premise is peculiarly unfounded in this case. The counsel silenced without factual showing include those from the Legal Defense Fund, recognized by the Supreme Court as having "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation," *NAACP v. Button,* 371 U.S. 415 at 422, 83 S.Ct. 328 at 332, 9 L.Ed.2d 405 at 411-12 (1963), and engaged in "a different matter from the oppressive, malicious or avaricious use of the legal process for purely private gain." *Id.* at 443, 83 S.Ct. at 343, 9 L.Ed.2d at 424. *See also Miller v. Amusement Enterprises, Inc.,* 426 F.2d 534, 539 n.4 (CA 5, 1970).

(2.) Court involvement in conciliation

Apart from the order's limit on communications, it inappropriately involved the court in the extra-judicial

conciliation effort. Gulf had mailed out back pay offers before suit was filed. In its motion to modify Judge Steger's order, Gulf asked the court to direct the clerk to send notices to all employees who had not accepted its offer and signed releases. Gulf's theory was that the court could do this under its power to supervise a settlement. The court granted the motion and extended the time for acceptance to 55 days from the date of the clerk's notice. The back pay offers were not offers to settle a lawsuit. The nudge given to black employees who had not accepted Gulf's offer, given under the official imprimatur of the court, was not permissible.

I would hold that the order was improvidently entered under the terms of Rule 23(d). Perhaps Rule 23(d) merely restates an implied power of the court. If that is so, exercise of the power is limited by the same restraints on the court's discretion that I have already discussed. I turn then to constitutional limitations.

III. The constitutional issues

The general rule is that otherwise protected utterances concerning the courts may be punished by contempt only if they pose "an imminent, not merely a likely threat to the administration of justice." *Craig v. Harney*, 331 U.S. 367, 376, 67 S.Ct. 1249, 1255, 91 L.Ed. 1546, 1552 (1947). The likelihood must be great that a serious evil will result, and the evil itself must be substantial. *Bridges v. California*, 314 U.S. 252, 260-63, 62 S.Ct. 190, 192-94, 86 L.Ed. 192, 202-03 (1941). Significantly, it is these two cases to which the *Manual* turns in addressing constitutional limitations. Pt. 2, § 141, n.33. Nor does the constitutional rule change when applied to lawyers,

even when they participate in the judicial process. *In re Halkin,* —U.S.App.D.C.—, 598 F.2d 176, 47 Cr.L. Rep. 2413 (1979). A lawyer's First Amendment rights to comment about pending or imminent litigation can be proscribed only if his comments pose a " 'serious and imminent threat' of interference with the fair administration of justice." *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 249 (CA 7, 1975), *cert. denied,* 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976) (quoting *In re Oliver,* 452 F.2d 111 (CA 7, 1971); *accord, Chase v. Robson,* 435 F.2d 1059, 1061 (CA 7, 1970); *cf. U.S. v. Tijerina,* 412 F.2d 661, 666 (CA 10), *cert. denied,* 396 U.S. 990, 90 S.Ct. 478, 24 L.Ed.2d 452 (1969) (reasonable likelihood that comments by criminal defendants will prevent a fair trial justifies court order prohibiting extrajudicial comments).

In this case the subject matter of the restraint on counsel's right to talk with potential class members about the case is plenary. The restraint is not limited to prohibiting solicitation of potential clients, discussed below. The attorneys may not counsel a black employee free of any effort to solicit him. The Third Circuit, in *Rodgers,* in holding invalid a local rule that contained a similar prohibition on communications between counsel and potential class members[13] did not reach the constitutional issue but noted the problem:

The imposition of such a condition upon access to the Rule 23 procedural device certainly raises serious first amendment issues. *See New Jersey State Lottery Comm'n*

13. The local rule in issue in *Rodgers* did not include the "constitutional right" exception which has been added to the suggested form in the *Manual.* I discuss below that this does not remove the constitutional issue.

v. United States, 491 F.2d 219 (3d Cir.), cert. granted, 417 U.S. 907, 94 S.Ct. 2603, 41 L.Ed.2d 211 (1974). There is no question but that important speech and associational rights are involved in this effort by the NAACP Legal Defense and Education Fund, Inc. to communicate with potential black class members on whose behalf they seek to litigate issues of racial discrimination. *See, e. g., United Transportation Union v. State Bar,* 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). And the interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment. *See Wood v. Georgia,* 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); *Craig v. Harney,* 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); *Pennekamp v. Florida,* 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); *Bridges v. California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941). Whatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world. *See* T. Emerson, The System of Freedom of Expression 449 et seq. (1970).

508 F.2d at 162-63.

Next I turn from the general restraint on the attorney to the specific restriction against solicitation in subparagraph (a) of ¶ 2 of the order: "[S]olicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action." *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), and its progeny, *In re Primus,* 436

U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971), *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967), and *Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964), mandate the conclusion that subparagraph (a) is unconstitutional. In *Button*, the Court concluded that NAACP solicitation of persons to bring civil rights suits was protected activity under the First and Fourteenth amendments. 371 U.S. at 428-29, 83 S.Ct. at 335, 9 L.Ed.2d at 415.[14] The solicitation was treated as a mode of political expression effectuated through group activity falling within the sphere of associational rights guaranteed by the First Amendment. The solicitation activities considered in *Button* included holding meetings to explain legal steps needed to achieve desegregation. At these meetings forms were circulated which authorized LDF attorneys "to represent the signers in legal proceedings to achieve desegration." 371 U.S. at 421, 83 S.Ct. at 332, 9 L.Ed.2d at 411.

In view of Gulf's statements to the trial court and the countering affidavit by plaintiffs' attorney, we do not know whether there has been express solicitation in this case similar to the distribution of forms in *Button*.[15]

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14. Because this case involves a restriction imposed by a federal court, the Fourteenth Amendment is not implicated.

15. The notice that plaintiffs asked leave to send does not explicitly solicit persons to engage plaintiffs' attorneys or to join in the class but urges employees to seek legal advice and to become informed. It tells employees that plaintiffs' attorneys will talk to them without charge, suggests as an alternative talking to some other attorney, and emphasizes that the class action will proceed. No one is expressly urged to join the class, reject a release, or return a check.

Whether plaintiffs' attorneys' attendance at the meeting was solicitation is not determinative. Here, as in *Button*, the subject matter is racial discrimination. Plaintiffs' attorneys are already engaged on behalf of black employees in seeking to vindicate their civil rights through court action, while in *Button* they were seeking clients to begin a suit. In both cases the activities at issue are those of LDF lawyers. The only material difference is that here employees must choose between the lawsuit and a conciliation offer while in *Button* there had been no conciliation and offer. The people attending the meetings held by the LDF lawyers in *Button*, however, did have to choose between initiating a lawsuit and not participating in a lawsuit. The type of choice the people would have to make here and in *Button* is not so different that the solicitation that could have occurred in this case was outside the scope of activity protected by *Button*. The characteristics of the solicitation that brought it within constitutional protection in *Button* are equally present in this case.

The continued vitality of *Button* was recently affirmed by the Supreme Court in *In re Primus, supra*. There the Court reversed a disciplinary reprimand issued against an ACLU lawyer for solicitation, 436 U.S. at 419, 98 S.Ct. at 1899, 56 L.Ed.2d at 427. The Court considered the economic relationship between the lawyer and the person solicited, the purpose of the litigation and the possibility of a conflict of interest between counsel and prospective client. Because the lawyer had no direct financial stake in the case, the case was a means of expressing a political belief, and there was no evidence of overreaching or misrepresentation, the Court concluded that South Carolina's

punishment of Primus for solicitation violated her First Amendment rights.[16]

Because the activity prohibited by subparagraph (a) of the district court's order is constitutionally protected activity it is necessary to consider whether there is a compelling government interest that justifies the prohibition and whether the means used are sufficiently specific " 'to avoid unnecessary abridgment of associational freedoms.' " *Id.* at 432, 98 S.Ct. at 1905, 56 L.Ed.2d at 434-35 (quoting *Buckley v. Valeo,* 424 U.S. 1, 25, 96 S.Ct. 612, 637, 46 L.Ed.2d 659, 691 (1976)). The *Primus* Court recognized that "the prevention of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, [and] lay interference," 436 U.S. at 432, 98 S.Ct. at 1905, 56 L.Ed.2d at 435, are evils the state may guard against and that these problems sometimes result from lawyer solicitation of clients. The Court went on to state, however, that prophylactic rules intended to guard against such evils are not permissible when aimed against constitutionally protected forms of solicitation because of their impact on First Amendment rights. *Id.* When dealing with *Button*-type solicitation, as opposed to commercial forms of solicitation, *see Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 98 S.Ct. 1912, 56

16. *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), decided the same day as *Primus,* sustained, against constitutional objections, bar sanctions of an attorney for solicitation. For purely pecuniary gain he visited in the hospital a person injured in an automobile accident and solicited her as a client. No political expression or associational rights or vindication of illegal racial discrimination was involved. Ohralik based his constitutional claim solely on the commercial speech doctrine. *See also Pace v. Florida,* 368 So.2d 340 (Fla. 1979); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein,* 393 A.2d 1175 (Penn. 1978).

L.Ed.2d 444 (1978), discussed in note 16, *supra*, there must be a showing that the solicitation "in fact involved the type of misconduct" 56 L.Ed.2d at 436, that may be constitutionally guarded against. A showing of potential danger does not suffice.[17] The lower court made no findings whether the substantive evils the court was constitutionally entitled to guard against had occurred. Without such findings subparagraph (a) of the order cannot stand.[18]

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17. As stated by the *Primus* Court

> Rights of political expression and association may not be abridged because of state interests asserted by appellate counsel without substantial support in the record or findings of the state court. See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789, 98 S.Ct. 1407, [1423,] 55 L.Ed.2d 707 (1978); *United Transportation Union v. Michigan Bar*, 401 U.S., at 581, 91 S.Ct. 1076 [, at 1080] 28 L.Ed.2d 339; *Sherbert v. Verner*, 374 U.S. 398, 407, 83 S.Ct. 1790, [1795,] 10 L.Ed.2d 965 (1963); *Button*, 371 U.S. at 442-443, 83 S.Ct. 328 [, at 342-343], 9 L.Ed.2d 405; *Wood v. Georgia*, 370 U.S. 375, 388, 82 S.Ct. 1364, [1371,] 8 L.Ed.2d 569 (1962); *Thomas v. Collins*, 323 U.S. 516, 530, 536, 65 S.Ct. 315 [322, 325,] 89 L.Ed. 430 (1945).

436 U.S. at 434 n. 27, 98 S.Ct. at 1906 n. 27, 56 L.Ed.2d at 436 n. 27.

18. Subparagraph (b) of ¶ 2 of the order forbids solicitation of fees and expenses despite the affidavit setting out that the NAACP provides its services free of charge. Arguably this hypothetical restraint does no injury except to the extent it adds to the overall chilling effect. However, I think it is appropriate to comment on it since it is part of the *Manual's* form. In *United Transportation Union v. State Bar of Michigan, supra*, the Supreme Court interpreted *Button* and cases following it to stand for the proposition that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *Id.* at 585, 91 S.Ct. at 1082, 28 L.Ed.2d at 347. In at least some situations the collection or solicitation of funds to defray litigation costs is a necessary adjunct to obtaining meaningful access to the courts. I would, therefore, give such activity constitutional protection in appropriate cases. The degree of protection would vary according to the use to which the funds are to be put. If they are to be used to pay lawyers, the solicitation presents some of the

Subparagraph (d) of ¶ 2 is applicable to this case and is in my view facially unconstitutional. It is narrower than the plenary proscription in the first sentence of the order, which prohibits all communications concerning the suit. Subparagraph (d) prohibits what might be called "objectionable communications." It prohibits all communications "which *may tend* to misrepresent [the class action] . . . and . . . which *may create* impressions tending, without cause to reflect adversely on any party, nay counsel, this Court or the administration of justice." (Emphasis added.) The order is overbroad because it is not limited to the clear and present danger test. "May tend to misrepresent," and "may create impressions" are not enough to justify suppression of protected speech. *See Chicago Council of Lawyers v. Bauer, supra* at 249. Also, while speech that poses an imminent threat to the fair administration of justice may be properly prohibited, speech that reflects adversely on any party or counsel may not. The only interests to which the First Amendment may be subordinated are compelling government interests. The government has no compelling interest in assuring that nothing unflattering will be said about Gulf or its attorneys.

It seems to me unnecessary to dwell at length on the vagueness of the order, particularly subparagraph (d).

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dangers recognized in *Primus* and *Ohralik* that a state or court may properly guard against. If the funds are to be used to defray litigation expenses, the solicitation is closer to the heart of gaining access to the courts. *See Norris v. Colonial Commercial Corp.*, 77 F.R.D. 672, 673 (S.D. Ohio, 1977) (solicitation of funds to defray litigation expenses of class action permitted with certain requirements imposed on the content of the solicitation letter). *See also Sayre v. Abraham Lincoln Federal Savings & Loan Ass'n*, 65 F.R.D. 379, 384-86 (E.D. Penn., 1974), *modified*, 69 F.R.D. 117 (1975).

Subparagraph (c) of ¶ 2, relating to solicitation of "opt out" requests, seems to me to have no application to this case. It applies only to Rule 23(b)(3) class actions, and this action was brought pursuant to 23(b)(2).

In advising a potential class member of the relative merits of class action versus back pay offered under the conciliation award, counsel will almost inevitably say something that will be construed to reflect upon Gulf's offer—indeed that is at the heart of this whole matter of lawsuit versus settlement. If counsel goes to an employees' meeting at all,[19] the only safe advice to him is to remain mute.

In a thoughtful analysis of the constitutional issues involved in this case, District Judge Boyle, in *Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782 (E.D.La., 1977), rejected a constitutional attack on his district's Local Rule 2.12(e) which is identical to the *Manual's* suggested rule. The court recognized that its rule

> restricts not only certain expressions by parties and counsel, but also impinges upon the constitutionally-derived interest of the recipient(s) to secure the communication. . . . Likewise limited by the rule's operation is the opportunity of the plaintiff organization to communicate concerning legal redress with those members who are not formal parties to the suit, which activity ordinarily would be entailed in the freedom of association and the collective right of an organizational membership to achieve effective judicial access.

Id. at 787 (citations and footnote omitted). The court then went on to catalogue the interests served by the Local Rule: (1) prohibition of solicitation of representation or funds protects laymen from unscrupulous attorneys and helps preserve the legal profession's image; (2) preservation of the court's obligation "to direct the 'best notice practicable' to class members, advising them of their

19. Assuming merely being there is not "indirect communication" as Gulf would seem to contend, *see* n.9, *supra*.

privilege to exclude themselves from the class," *id.* at 790, pursuant to Rule 23(c)(2) for class actions brought under Rule 23(b)(3); and (3) the administration of justice by preventing misrepresentations. *Id.* at 790-91. The court found these objectives sufficiently important to override the inhibitions on First Amendment rights and that the rule is the least drastic alternative.

I have several problems with the district court's analysis. First, the three categories of interests served by the rule can be tied to the specific prohibitions. The court does not explain how the plenary prohibition against all communications absent prior approval serves the specified goals other than to note that "the ingenuity of those determined to wrongly take advantage of the class action procedure would likely prevail over any . . . attempt at prohibition by itemization." *Id.* at 791-92. I think the plenary prohibition in the first sentence of ¶ 2 of the order is facially overbroad. Communications that do not threaten any of the interests enumerated by the court are prohibited. When dealing with First Amendment rights, greater specificity is required.

District Judge Bue of the Southern District of Texas reached the same conclusion as I reach in his analysis of the amendments his district adopted to the *Manual's* suggested rule. The Southern District's rule contains only the specific prohibitions, dropping the across-the-board restraints. The primary reason for the change was to avoid a violation of the First Amendment by overbreadth: "The key to a constitutional rule which regulates class communication is to narrow down those instances in which a prior restraint is imposed to those in which the types of communications subject to judicial review before dissemination are clearly defined and clearly capable of

Rule 23 abuse." Bue, *Analysis of Proposed Revision of Local Rule 6 of the United States District Court for the Southern District of Texas,* (quoted in *Bulletin, Manual for Complex Litigation,* Federal Judicial Center, 9-10 (Aug. 25, 1978)).

Also, *Waldo* fails to distinguish between commercial forms of solicitation and *Button*-type solicitation. The significance of this distinction has already been discussed. Because the rule does not make this distinction, its prohibition on solicitation is overbroad. The government interests that may legitimately be protected by prohiting commercial solicitation do not usually need to be protected when *Button*-type solicitation is involved because it does not pose the same dangers as commercial soliciation. Moreover, the constitutional scrutiny given to a ban on commercial solicitation or punishment for engaging in such solicitation is significantly lower than the scrutiny given prohibitions on *Button*-type solicitation. Commercial solicitation is protected only by the commercial speech doctrine, which requires a lower level of scrutiny than required when there is an infringement of the constitutional rights of association and political expression which occurs when *Button*-type solicitation is prohibited. *Compare In re Primus, supra, with Ohralik v. Ohio State Bar Association, supra.*

The *Waldo* court's concern with protecting the administration of justice from misrepresentations of cases pending before it is legitimate. But the "reasonable likelihood" standard incorporated in the rule simply fails to comply with constitutional standards.

The proviso permitting post-distribution filing of a notice thought to be constitutionally protected is not a

cure. "This provision does not eliminate—indeed it highlights—the overbreadth and resultant chilling effect of the [*Manual's*] proposed rule." Comment, 88 Harv.L.Rev. 1911, 1922 n. 74 (1975). The majority's conclusion that the assertion of a good faith belief gives total protection is disingenuous. The district court would still be entitled to inquire into the bona fides of counsel's belief.[20] Because counsel may be called upon to establish the basis for his good faith belief, and therefore is put at risk for possibly violating the court's order, the good faith exception does not ameliorate the chilling effect of the order. It is little comfort for a conscientious attorney to be told that he may communicate with potential class members but that at a later time may be called upon by the court to justify the communication.[21] Even if facially

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20. Although *Screws v. U. S.*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945), probably requires a showing of specific intent to violate the court's order, that is certainly not the total protection from punishment envisioned by the majority; indeed, it indicates that assertion of good faith is not total protection.

21. The majority argues that "[o]nce plaintiffs submitted the proposed communication to the district judge . . . the exemption for communications they asserted were constitutionally protected was no longer relevant." The issue before the district court on a motion for permission to distribute would be whether the proposed communication is constitutionally protected, but the issue on this appeal is the constitutionality vel non of the order. In our examination of this issue, the constitutional exception provision is certainly relevant; indeed the unwillingness of the attorneys to rely on the exception in distributing the leaflet demonstrates the order's chilling effect. It is the proof of the pudding. Having lost on their motion to have the order restraining their communications declared unconstitutional, the reasonable—and respectful—course for them to follow was to ask the court's guidance before distributing the leaflet rather than take their chances under the constitutional exception. I assume that the majority does not mean that had the plaintiffs specifically renewed their constitutional objection to the order at the time they requested permission to distribute the leaftlet the chilling effect of the order could not have been considered by the district court. Such a position

a cure, the constitutional exception is no cure as applied to these plaintiffs who prudently asked for pre-distribution approval of the leaflet reproduced above rather than risk post-distribution filing and were given a belated denial.

IV. Conclusion

The district court misused its discretion under Rule 23(d) and violated the constitutional rights of plaintiffs' counsel, named plaintiffs and all other actual or potential members of the class by entering the orders. I dissent from Part IV of the majority opinion and would vacate the district court's order as modified.

JAMES C. HILL, Circuit Judge, specially concurring:

Being bound by the prior decisions of this Court, as I ought to be, I concur. *Beker Phosphate Corp. v. Muirhead,* 581 F.2d 1187, 1190 n. 10 (5th Cir. 1978).

My observations concerning the path upon which we embarked in *Zambuto v. American Telephone and Telegraph Co.,* 544 F.2d 1333 (5th Cir. 1977) are set out in my dissent to the opinion for the En Banc Court in *White v. Dallas Independent School District,* 581 F.2d 556, 563 (5th Cir. 1978) (Hill, J., concurring in part and dissenting in part).

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would be untenable. It is not necessary to disobey a court order to be able to make a chilling effect attack on it. Indeed, the exact opposite is normally required. A party may not violate a court order and then in a contempt proceeding for violating the order challenge its constitutionality. *Walker v. City of Birmingham,* 388 U.S. 307, 316-17, 87 S.Ct. 1824, 1830, 18 L.Ed.2d 1210, 1217 (1967).

Wesley P. BERNARD et al.,
Plaintiffs-Appellants,

v.

GULF OIL COMPANY et al.,
Defendants-Appellees.

No. 77-1502

UNITED STATES COURT OF APPEALS
Fifth Circuit.

Sept. 27, 1979.

Appeal from United States District Court, Eastern District of Texas; Joe J. Fisher, District Judge.

Ulysses Gene Thibodeaux, Lake Charles, La., Barry L. Goldstein, Washington, D. C., Jack Greenberg, Patrick O. Patterson, New York City, for plaintiffs-appellants.

William H. Ng, Joseph T. Eddins, Assoc. Gen. Counsel, Charles L. Reischel, Asst. Gen. Counsel, Equal Employment Opportunity Commission, Washington, D. C., amicus curiae, for E.E.O.C.

Joseph H. Sperry, Wm. G. Duck, Kathleen M. Civins, Susan R. Sewell, U. S. Jones, Houston, Tex., for Gulf Oil.

Carl A. Parker, Port Arthur, Tex., for Oil, Chemical & Atomic Workers, Etc.

Michael D. Murphy, Port Arthur, Tex., for appellees.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING
EN BANC.

(Opinion June 15, 1979, 5 Cir., 1979, 596 F.2d 1249).

Before BROWN, Chief Judge, COLEMAN, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, JOHNSON, GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON and RANDALL, Circuit Judges.*

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

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* Judges Goldberg and Ainsworth have recused themselves and did not particpate in this decision.

Wesley P. BERNARD et al.,
Plaintiffs-Appellants,

v.

GULF OIL COMPANY et al.,
Defendants-Appellees.

No. 77-1502

UNITED STATES COURT OF APPEALS
Fifth Circuit.

June 19, 1980.

Employment discrimination suit was brought against employer and unions based on allegation that the employer and the unions had discriminated against plaintiffs and similarly situated black employees in violation of federal law. The United States District Court for the Eastern District of Texas, Joe J. Fisher, Chief Judge, entered an order prohibiting the parties and their counsel from communicating with potential class members without court approval and later granted defendants' motions for summary judgment. Plaintiffs appealed, and the Court of Appeals, 596 F.2d 1249, reversed and remanded. Thereafter, the Court of Appeals, 604 F.2d 449, granted a rehearing en banc. The Court of Appeals, en banc, Godbold, Circuit Judge, adopted Parts I, II and III of the panel opinion and held that: (1) the district court's order which broadly restricted communication by parties and their counsel with actual and potential class members was an unconstitutional prior restraint of speech; (2) the order would be unconstitutional even if it were tested

under the more relaxed standards applicable to subsequent restraints on speech; and (3) the order was not an "appropriate order" within the meaning of the class action rule.

Order of district court vacated and judgment of district court reversed and remanded.

Tjoflat, Circuit Judge, concurred in the result and filed opinion in which Brown, Gee, Henderson and Reavley, Circuit Judges, joined.

Fay, Circuit Judge, filed specially concurring statement in which Coleman, Chief Judge, and Roney, Circuit Judge joined.

James C. Hill, Circuit Judge, dissented and filed opinion.

* * *

Ulysses Gene Thibodeaux, Lake Charles, La., Barry L. Goldstein, Washington, D. C., Jack Greenberg, Patrick O. Patterson, New York City, for plaintiffs-appellants.

William H. Ng, Atty., Joseph T. Eddins, Jr., Assoc. Gen. Counsel, Charles L. Reischel, Asst. Gen. Counsel, Susan B. Reilly, Lutz A. Prager, Equal Employment Opportunity Commission, Washington, D. C., Carol E. Heckman, Jessica Dunsay Silver, Drew S. Days, III, Asst. Atty. Gen., Appellate Sec., Civil Rights Div., Dept. of Justice, Washington, D. C., amicus curiae, for E.E.O.C.

Wm. G. Duck, Susan R. Sewell, U. S. Jones, Houston, Tex., for Gulf Oil.

Michael D. Murphy, Port Arthur, Tex., for Oil, Chemical & Atomic Workers, Etc.

John D. Buchanan, Jr., Tallahassee, Fla., William F. Kaspers, Atlanta, Ga., for amicus Tallahassee Memorial Hospital.

Appeal from the United States District Court for the Eastern District of Texas.

Before COLEMAN, Chief Judge, BROWN, GODBOLD, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON and THOMAS A. CLARK, Circuit Judges.*

GODBOLD, Circuit Judge:

This suit was brought as a class action by six present or retired black employees of the Port Arthur, Texas, plant of Gulf Oil Company, under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2) and 42 U.S.C. § 1981. The members of the asserted class are black employees and black former employees of the Port Arthur plant, and black applicants rejected for employment with Gulf Oil (at the Port Arthur plant and elsewhere). The defendants are Gulf Oil and the Oil, Chemical and Atomic Workers' Union.

Plaintiffs charged that Gulf discriminated against blacks in hiring, job assignments, pay scales, discipline and discharge, employed discriminatory tests and racially tainted promotion and progression practices, and denied

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* Judges Goldberg, Ainsworth and Charles Clark did not participate in the consideration or decision of this case.

training to blacks and refused seniority to blacks. They alleged that the union had agreed to, acquiesced in or condoned Gulf's discriminatory practices. The district court dismissed the Title VII claim as untimely filed, granted summary judgment for defendants on the § 1981 claim, and applied laches as an additional ground for its disposition of both claims. With respect to these three holdings, we adopt parts I, II, and III of the panel opinion[1] and reverse and remand to the district court. A fourth issue we will consider at length. It concerns the validity of an order of the district court restricting communications by named plaintiffs and their counsel with actual and potential class members not formal parties to the suit. By a divided vote the panel found the order valid. 596 F.2d at 1258. We hold that the order violated the First Amendment to the Constitution and Rule 23, Fed.R.Civ.P.

I. *The background*

The facts are accurately stated in the dissenting opinion to the panel decision, 596 F.2d at 1262-76, and the court adopts that statement. We restate the facts in condensed form.

In April 1976, Gulf and EEOC entered into an extrajudicial conciliation agreement covering alleged racial discrimination against blacks at the Port Arthur plant and providing for conciliation of alleged discriminatory practices and for back pay to 614 present and former black employees. No employees were parties to the agreement.

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1. *Bernard v. Gulf Oil Co.*, 596 F.2d 1249, *vacated*, 604 F.2d 449 (5th Cir. 1979).

Plaintiffs brought this suit in May, 1976, represented by local counsel in association with New York attorneys from the NAACP Legal Defense and Education Fund. Before answering and before a class was certified, Gulf filed an unsworn request that the court enter an order limiting communication by parties and their counsel with actual or potential class members. Gulf asserted that it had received reports that one of plaintiffs' attorneys had attended a meeting of actual and potential class members and had advised the group not to sign receipts and releases sent to them pursuant to the conciliation agreement because he could recover twice as much for them in the suit just filed.

District Judge Steger entered a temporary order on May 28.[2] Gulf filed an additional unsworn charge that the same plaintiffs' attorney had also recommended that employees who had already signed receipts and releases should return their checks. Gulf also filed an affidavit from EEOC which stated that the issues in the suit were almost identical to those embraced in the conciliation agreement.

Plaintiffs challenged the constitutionality of the temporary order. They filed affidavits denying Gulf's charges and a brief asserting that numerous issues in the suit were not within the matters conciliated. On June 22, without proof of the unsworn charges made by Gulf and without entering findings of fact, Chief District Judge Fisher rejected plaintiffs' constitutional arguments and entered a modified order explicitly modeled on that suggested in the *Manual for Complex Litigation*, Part II, § 1.41 (1973

2. It is substantially the same as ¶ 2 of the modified order. *See* n. 4 *infra*.

ed.),[3] a publication widely used by federal judges. It is the validity of this modified order that is now before us.

On July 6 plaintiffs moved for permission for themselves and their counsel to communicate with members of the proposed class and also asked for guidance from the court. They attached a notice, reproduced at 596 F.2d 1266, which they proposed to distribute and asserted that they were constitutionally entitled to distribute. The notice alerted black employees to the existence of the lawsuit as an alternative to acceptance of Gulf's conciliation offer and urged them to talk to an attorney. The time for acceptance of Gulf's conciliation offer expired on or about August 8. On August 10, the court, without explanation, denied plaintiffs' motion by a one-sentence order.

II. *The provisions of the order*

The order, described by plaintiffs as a "gag order," is broad in scope and plenary in nature, forbidding a wide range of communications.[4]

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3. The form of the suggested order is the same in the 1977 edition of the *Manual*.

The 1977 edition also appears at 1 Pt. 2 Moore's Federal Practice, Part II, ¶ 1.41, at 226-28 (2d ed. 1979) and Wright & Miller, *Manual for Complex Litigation*, Part II, § 1.41 at 188-89 (1977).

4. The order, as modified, provided:

IT IS ORDERED:

(1) That Gulf's motion to modify Judge Steger's Order dated May 28, 1976 is granted;

(2) That Judge Steger's Order dated May 28, 1976 be modified so as to read as follows:

In this action, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed

The persons enjoined are "all parties hereto and their counsel."

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addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F. R. Civ. P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

(3) That Gulf be allowed to proceed with the payment of back pay awards and the obtaining of receipts and releases from those employees covered by the Conciliation Agreement dated April 14, 1976, between Gulf, the U.S. Equal Employment Opportunity Commission and the Office for Equal Opportunity, U.S. Department of the Interior; That the private settlement

The subject matter forbidden is communications with any actual or potential class member not a formal party,

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of charges that the employer has violated Title VII is to be encouraged, *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976).

(4) That the Clerk of the Court mail a notice to all employees of Gulf at its Port Arthur Refinery who are covered by the Conciliation Agreement and who have not signed receipts and releases for back pay awards informing them that they have 45 days from the date of the Clerk's notice to accept the offer as provided for by the Conciliation Agreement or such offer will expire until further order of the Court;

(5) That the contents of the notice be the same as that set out in Appendix I;

(6) That Gulf bear the expense of mailing the notice and a copy of the Court's order to the individuals covered by item (4) above;

(7) That all employees who have delivered receipts and releases to Gulf on or before 55 days from the date of the Clerk's notice shall be deemed to have accepted the offer as contained in the Conciliation Agreement;

(8) That any further communication, either direct or indirect, oral or in writing (other than those permitted pursuant to paragraph (2) above) from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden;

(9) That Gulf inform the Court 65 days from the date of the Clerk's notice to be sent by the Clerk of the Court of the names of potential or actual class members who have accepted the offer of back pay and signed receipts and releases pursuant to the Conciliation Agreement and the names of those who have refused or failed to respond.

It is Plaintiff's contention that any such provisions as hereinbefore stated that limit communication with potential class members are constitutionally invalid, citing *Rodgers v. United States Steel Corporation*, 508 F.2d 152 (3rd Cir. 1975), *cert. denied*, 420 U.S. 969, 95 S.Ct. 1386, 43 L.Ed.2d 649 (1975). This Court finds that the *Rodgers* case is inapplicable, and that this order comports with the requisites set out in the *Manual for Complex Litigation*, Section 1.41, p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court.

Bernard v. Gulf Oil Co., supra, 596 F.2d at 1258 n. 9.

"concerning [this] action . . . without the consent and approval of the proposed communication and proposed addressees by order of this Court." More specific communications that the proscription includes, but is not limited to, are: (a) solicitation of legal representation of potential and actual class members not formal parties; (b) solicitation of fees and expenses; (c) solicitation of requests by class members to opt out; and (d) "communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice."

The means of communication forbidden are "directly or indirectly, orally or in writing."

The order contains several exceptions, set out in the second subparagraph of ¶ (2): communications between attorney and client, and between attorney and prospective client, when initiated by the prospective client, and communications in the the regular course of business.

The third subparagraph of ¶ (2) is a much-debated provision requiring post-communication filing with the court of any communication asserted to be constitutionally protected:

> If any party or counsel for a party asserts a constitutional right to communicate with any member of the class without prior restraint and does so communicate pursuant to that asserted right, he shall within five days after such communication file with the Court a copy of such communication, if in writing, or an accurate and substantially complete summary of the communication if oral.

The order also contains a provision that the clerk of the district court send a notice to those employees covered by the conciliation agreement who have not signed receipts and releases for back pay. The notice, which is an appendix to the order, tells the employee that this case is pending, and briefly describes it, and that he has been identified as an actual or potential class member. It describes the outstanding conciliation offer from Gulf and tells the employee that he has a choice of accepting the Gulf offer or declining it and being considered at a later date for inclusion in the class in the suit. Employees are told they have 45 days in which to accept the conciliation offer.

III. *The basis for the order*

Presumably, since the district court made no findings, its order was based upon suggestions contained in the *Manual,* which recommends that procedures be devised to anticipate and prevent potential abuses in class actions, including solicitation of representation, solicitation of funds and of opt-out requests, and misrepresentations that may create confusion and reflect adversely on the court or the administration of justice. *Manual,* Part I, § 1.41. The *Manual* recommends that district courts adopt local rules imposing "in every potential and actual class action" substantially the ban on communication that is here involved, and in the absence of a local rule[5] impose the ban by an order entered promptly after the filing of any actual or potential class action. *Id.* Part I, § 1.41; Part II, § 1.41 (Suggested Local Rule 7 and Suggested Pre-

5. The district court here involved had not adopted a local rule.

trial Order No. 15).[6] Our interpretation of the basis for the court's order is reinforced by the court's rejection of plaintiffs' constitutional arguments on the ground that the order it had entered comported with the requirements of the *Manual.*

We can assume that the district court did not ground its order on a conclusion that the charges of misconduct made by Gulf were true. Nothing in its order indicates that it did, and, if it did, such a conclusion would have been procedurally improper and without evidentiary support. Rather the court appears to have acted upon the rationale of the *Manual* that the court has the power to enter a ban on communications in any actual or potential class action as a prophylactic measure against potential abuses envisioned by the *Manual.*[7]

IV. *The order is a prior restraint*

The order represents a significant restriction on First Amendment rights. Because no other court of appeals has ruled on the constitutionality[8] of the *Manual's* sug-

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6. The only significant difference between the suggested local rule and the suggested pretrial order is the wording of the rule's "constitutional right" exception. The suggested rule provides: "Nor does the rule forbid communications protected by a constitutional right." It then imposes the same post-communication filing requirements that the order does. While we here consider the constitutionality of the *Manual's* suggested order, much of our analysis is equally applicable to the suggested local rule. *See* n. 22 *infra.* The semantic change does not alter the thrust of the rule.

7. The panel majority interpreted the district court's action as we do. It treated Gulf's charges as irrelevant and considered that the district court had plenary power in a class action to ban communications by a prophylatic order. 596 F.2d at 1261 n. 14.

8. In 1975 the Third Circuit raised the constitutional issue and expressed its doubts about the power of the district court to impose

gested rule and order, and because of the broad impact

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a prior restraint on communication or association in *Rodgers v. U. S. Steel Corp.*, 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832, 96 S.Ct. 54, 46 L.Ed.2d 50 (1975) (*Rodgers I*):

> The imposition of such a condition [prior approval] upon access to the Rule 23 procedural device certainly raises serious first amendment issues. *See New Jersey State Lottery Comm'n v. United States*, 491 F.2d 219 (3d Cir.), *cert. granted*, 417 U.S. 907, 94 S.Ct. 2603, 41 L.Ed.2d 211 (1974). There is no question but that important speech and associational rights are involved in this effort by the NAACP Legal Defense and Education Fund, Incc. to communicate with potential black class members on whose behalf they seek to litigate issues of racial discrimination. *See, e. g., United Transportation Union v. State Bar*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). And the interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment. *See Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962); *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946); *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941). Whatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world. *See* T. Emerson, The System of Freedom of Expression 449 et seq. (1970).
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> [T]he committee which drafted the *Manual* probably went too far in its apparent assumption that *Craig v. Harney, supra*, and *Bridges v. California, supra*, would permit the vesting of unreviewable discretion in a district court to impose a prior restraint on communication or association. 1 J. Moore, *supra*, at 29 n. 28.

508 F.2d at 162-63, 165. However, the Third Circuit elected to proceed on a statutory ground, and no circuit has since directly confronted the constitutional issue.

The Second Circuit, in *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972), rested its refusal to overturn a similar restriction on the unreviewability of discretionary orders by writ of mandamus, and thus did not deal with the constitutionality of the order.

The 1977 edition of the *Manual* adhered to the position of the 1973 edition. The 1978 Supplement reviews the division in the

of the *Manual's suggestions*,[9] we address the constitutional issues before us.

[1] We hold that the order entered in this case is an unconstitutional prior restraint.

[2] Prior restraints on freedom of speech have long been disfavored in American law. *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). While a prior restraint is not unconstitutional per se, there is a heavy presumption against its constitutionality. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59, 95 S.Ct. 1239, 1246, 43 L.Ed.2d 448, 459 (1975); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1, 5 (1971). We discuss in Part VI, below, the circumstances under which a prior restraint may be held lawful.

[3] Prior restraint has traditionally been defined as a "predetermined judicial prohibition restraining specified expression. . . ." *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975), *cert. denied*, 427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976); *see also Nebraska Press Association v. Stuart*, 427 U.S. 539,

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authorities concerning the validity of the recommended rule and order, but concludes:

> [T]here should be no modification of the foregoing recommendations or of the sample rule and order based thereon, except when a controlling decision of the court of appeals of the circuit requires it.

Id., Part I, § 1.41, p. 3.

9. The local rule suggested by the *Manual* has been adopted in numerous districts. *See* S.D. Fla. R. 19; N.D. Ga. R. 221.2, 3; N.D. Ill. R. 22; D. Md. R. 20; M.D. N.C. R. 17(b)(6); S.D. Ohio R. 3.9.4; S.D. Tex. R. 6; W.D. Wash. R. 23(g). No doubt many ban orders have also been entered independently of local rules, on the suggestion of the *Manual*. *See, e. g., NOW v. Minnesota Mining and Manuf. Co.*, 18 FEP Cas. 1177 (D. Minn. 1977).

559, 96 S.Ct. 2791, 2802, 49 L.Ed.2d 683, 697-98 (1976); *Near v. Minnesota, supra;* Litwack, *The Doctrine of Prior Restraint,* 12 Harv.C.R.-C.L.Rev. 519, 520 (1977). This expansive definition has not often been further elaborated. There are, however, four separate but related features that may serve to distringuish prior restraints from limitations on free speech imposed by subsequent restraints.

[4] *1. Origin.* A prior restraint is generally judicial rather than legislative in origin, although an enabling statute may authorize the judicial suppression of publication. *Near v. Minnesota, supra.* The essence of prior restraint is that it places specific communications under the personal censorship of the judge. Kalven, *Foreword: Even When a Nation is at War,* 85 Harv.L.Rev. 3, 33 (1971) [hereinafter Kalven].[10]

The district court's order is undeniably judicial in origin.[11]

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10. The classic prior restraint is an administrative licensing scheme adopted pursuant to a statute. The licensor has broad discretion with regard to each publication to be restrained. *See, e. g., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); *Penthouse Int'l, Ltd. v. McAuliffe,* 610 F.2d 1353, 1359-61 (5th Cir. 1980). The distinction between this type of scheme and a more general legislative enactment is that the restraint operates only on specific publications, chosen by the administrator. There is thus less room for diversity to exercise its "tendency to break and control the violence of faction." The Federalist No. 10 (Madison). The same danger exists with respect to judicial restrictions on free speech; indeed, most of the more recent prior restraint cases have involved judicial rather than administrative licensing. *See, e. g., Nebraska Press Association v. Stuart, supra; New York Times Co. v. U. S.,* 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).

11. We need not pass on the validity of the distinction made by the Seventh Circuit in *Chicago Council of Lawyers v. Bauer, supra,* 522 F.2d at 248, between courts as judicial bodies and courts as

2. Purpose. It has been suggested that the sole purpose of a prior restraint is suppression rather than punishment. *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 558-59, 95 S.Ct. at 1246, 43 L.Ed.2d at 459; *Near v. Minnesota, supra,* 283 U.S. at 715, 51 S.Ct. at 630, 75 L.Ed. at 1367. Unlike a criminal statute, which by its terms defines the punishment for its violation, a prior restraint "does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication." *Near, supra,* 283 U.S. at 715, 51 S.Ct. at 631, 75 L.Ed. at 1367. The justification for drawing a distinction based on this difference is that "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1246, 43 L.Ed.2d at 459; *see also New York Times Co. v. U. S.,* 403 U.S. 713, 733, 91 S.Ct. 2140, 2151, 29 L.Ed.2d 822, 836 (1971) (White, J., concurring).

Without question, the purpose of the order is restraint upon publication.

3. Means of enforcement. This distinction between prior and subsequent restraints is inextricably linked to the prior restraint's judicial origin and unique purpose. "Punishment by contempt is an important attribute of a 'prior restraint' that distinguishes it from a criminal statute that forbids a certain type of expression." *Chicago Council of Lawyers v. Bauer, supra,* 522 F.2d at 248. The

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rulemaking or quasi-legislative bodies. However, since the instant order was promulgated in the course of litigation and not as a local rule, it satisfies even that Circuit's definition of a judicial restraint.

penalty is thus both more swiftly imposed and less subject to the mitigating safeguards of the criminal justice system than is the punishment for violation of a statute. *See Nebraska Press Association v. Stuart, supra,* 427 U.S. at 559, 96 S.Ct. at 2802, 49 L.Ed.2d at 697-98; *U. S. v. Gurney,* 558 F.2d 1202, 1208 (5th Cir. 1977), *cert. denied,* 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978). This lack of safeguards accentuates the dangers inherent in any suppression of speech. *See Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1246, 43 L.Ed.2d at 459-60; *In re Halkin,* 598 F.2d 176, 184, n. 15 (D.C. Cir. 1979).

The expression restrained in this case is not forbidden by any statute. The text of the order is silent as to means of enforcement,[12] and there are other possible means available,[13] but the appellees accept that the means of enforcement intended is the contempt power of the court, and we agree.[14]

The dangers associated with the penalty of contempt inhere even though other sanctions are to some extent available. Persons subject to the order before us could

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12. The *Manual* is silent also.

13. Possibly the court could penalize a plaintiff attorney who disobeyed the order by removing him as attorney for the class, or deny or withdraw class action status, *Halverson v. Convenient Food Mart, Inc.,* 458 F.2d 927 (7th Cir. 1972); *Korn v. Franchard Corp.,* 456 F.2d 1206 (2d Cir. 1972); *Kronenberg v. Hotel Governor Clinton, Inc.,* 281 F.Supp. 622 (S.D. N.Y. 1968), or remove as class representative a plaintiff who disobeyed. Sanctions such as these would not be available, however, against defendants and their counsel. With respect to them, contempt would seem to be the only available sanction.

14. Contempt here would be criminal because used to punish past misconduct. *In re Timmons,* 607 F.2d 120, 123-24 (5th Cir. 1979).

reasonably conclude that the court's contempt power extended to enforcement of the order, and the conclusion is inescapable that it was exposure to contempt that silenced plaintiffs' attorneys and caused them to ask leave of court to send out the notice to class members.[15]

Moreover, the potential availability of other sanctions cannot serve to reduce the constitutional infirmity of the order. This prong of the test is concerned primarily with the lack of procedural safeguards associated with the enforcement of prior restraints. The fact that contempt is only one of several alternative sanctions does not ameliorate this concern.

[5-7] *4. Means of constitutional challenge.* While the unconsitutionality of a statute may be raised as a defense to prosecution for its violation, a litigant who disobeys an injunction is precluded from raising its constitutional invalidity as a defense in contempt proceedings. *Compare Shuttlesworth v. Birmingham,* 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) *with Walker v. Birmingham,* 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967); *see U. S. v. Dickinson,* 465 F.2d 496 (5th Cir. 1972), *cert. denied,* 414 U.S. 979, 94 S.Ct. 270, 38 L.Ed.2d 223 (1973) (applying rule against collateral attack to judicial restriction on publication); *cf. In re Timmons,* 607 F.2d 120, 124-25 (5th Cir. 1979) (similar distinction between civil and criminal contempt). Thus, a prior restraint may be distinguished from a statute prohibiting

15. One who may be willing to violate a statute, and thus risk criminal penalties, may be less willing to act in direct defiance of an injunction or court order and thus subject himself to the court's potential contempt power. *See in re Halkin, supra,* 598 F.2d at 184 n. 15; *Rodgers I, supra,* 508 F.2d at 161; Kalven, *supra,* 85 Harv. L. Rev. at 34 & n. 156; Note, 88 Harv. L. Rev. 1911, 1922 (1975).

publication in that the former has "an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 559, 96 S.Ct. at 2803, 49 L.Ed.2d at 698. As one commentator has eloquently observed: "Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss—a loss in the immediacy, the impact, of speech." A. Bickel, The Morality of Consent 61 (1975), *quoted in Nebraska Press Association v. Stuart, supra,* 427 U.S. at 609, 96 S.Ct. at 2826, 49 L.Ed.2d at 727 (Brennan, J., concurring).

The impact of the present order was direct and immediate. It silenced the named plaintiffs and their attorneys during the period that Gulf's conciliation offers were outstanding and putative class members were considering whether to accept. A named plaintiff, questioned by the black employee working next to him concerning the suit or the relative advantages of conciliation award and suit, could not reply. The order cut off dialogue[16] despite the contentions of plaintiffs' counsel that some of the issues in the suit were not covered by the conciliation agreement to which plaintiffs and putative class members were not parties and that the conciliation benefits to the putative

16. Exception (2) in the second subparagraph of ¶ (2) permits communication between attorney and client, and between attorney and prospective client if on the initiative of a client or the prospective client. This provision concerning prospective clients is largely illusory; presumably, in a class action, a prospective client (class member) would often learn of the attorney from a present client (a named plaintiff), but here the present client is forbidden to talk to the prospective client.

class were inadequate. It stopped investigation and discovery at a time when it is critical, just after suit has been filed.

Fragile First Amendment rights are often lost or prejudiced by delay. *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 609, 96 S.Ct. at 2826, 49 L.Ed.2d at 727 (Brennan, J., concurring); *Zwickler v. Kooto,* 389 U.S. 241, 252, 88 S.Ct. 391, 397, 19 L.Ed.2d 444, 452 (1967); *Collin v. Smith,* 578 F.2d 1197, 1209 (7th Cir.), *cert. denied,* 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed. 2d 264 (1978); *A Quaker Action Group v. Hickel,* 421 F.2d 1111, 1116 (D.C. Cir. 1969); Barnett, *The Puzzle of Prior Restraints,* 29 Stan.L.Rev. 539, 545 (1977). Courts have therefore been commendably willing to expedite proceedings involving First Amendment rights. *See New York Times Co. v. U. S., supra,* (Supreme Court decision issued 15 days after first TRO, 17 days after initial publication). Here, during the pendency of the conciliation offer, potential class members were substantially deprived[17] of the opportunity to confer with the attorneys presumably most knowledgeable, concerning whether they should accept Gulf's offer or look to the suit for redress. At the time they most needed counsel they were cut off from the attorneys most available until the time to make a choice had expired.[18]

The ban on communications is especially egregious both because this is a race discrimination case and because the counsel silenced without factual showing include

17. *See* n. 16 *supra.*

18. The impact of the restraint in this case is exacerbated by the inevitable delay associated with appellate litigation. The court en banc decides this case almost four years after the ban on communications was entered.

those from the Legal Defense Fund, recognized by the Supreme Court as having "a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation," *NAACP v. Button*, 371 U.S. 415, 422, 83 S.Ct. 328, 332, 9 L.Ed.2d 405, 411-12 (1963), and engaged in "a different matter from the oppressive, malicious, or avaricious use of the legal process for private gain." *Id.* at 443, 83 S.Ct. at 343, 9 L.Ed.2d at 424. *See also Miller v. Amusement Enterprises, Inc.*, 426 F.2d 534, 539 n.14 (5th Cir. 1970).

Faced with the principle that one who violates an injunction may not raise unconstitutionality as a defense in contempt proceedings, appellees construe the order to permit a defense to contempt. The constitutionally protected status of the proposed communication or the communicator's good faith belief in that status, appellees argue, would constitute a defense to contempt. This qualified defense is not found within the order but was read into it by the panel majority. 596 F.2d at 1261.

Even if this construction is correct, the defense is so freighted with preconditions and uncertainties that it is little comfort to attorney or party. Under appellees' construction, the filing requirement is a prerequisite to assertion of constitutionality, or good faith belief in constitutionality, as a defense.[19] Indeed it is only by the vehicle of the filing requirement that appellees read into the order a defense not otherwise available in a contempt case.[20]

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19. It is not contended that the act of filing is an absolute defense to contempt. There would be little purpose in entering an order with such a meaning.

20. Facially the filing requirement is nothing more than a means of notice to the court, unrelated to a defense of contempt. No one advances this interpretation, and we doubt it was intended.

The filing requirement itself chills expression. With respect to the individual class members, filing within five days a "complete summary" of every oral communication about the case had by each class member with any of his black fellow employees, is a practical impossibility. Beyond that, knowledge of what may be constitutionally protected is not readily available to the usual employee. In a real sense, for the individual plaintiffs silence is the only alternative. An attorney will have the knowledge, and better means, to file reports with the court as required, but if he asserts that he is constitutionally entitled to talk with prospective clients, ask financial aid, or seek support from a group or the community, filing will be a substantial burden. An attorney claiming a constitutional right to talk with witnesses could find compliance well nigh impossible. Also, the filing requirement arguably runs afoul of the attorneys' work product rule of *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947).

The conditional defense is accompanied by a second chilling effect, the risk of trial on criminal contempt charges, with guilt or innocence possibly turning on whether one's assertion of constitutional protection has been made in "good faith." Moreover, the omissions and ambiguities of the order and possible differing constructions as to when if at all, one is protected against contempt, accentuate the chilling effect.[21]

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21. For example, in addition to the general ban on communications, subparagraph (a) of ¶ (2) expressly forbids solicitation. Prudent counsel very well may conclude that he cannot safely rely upon asserting constitutional protection in the face of this specific ban—if there is a "good faith" defense can counsel be in good faith if he does what he is expressly ordered not to do? As one commentator has noted:

The proviso exempting constitutionally-protected communication

Most attorneys, faced with an order like the one before us,[22] would pursue the course chosen by counsel in this case and seek prior approval of the court before attempting to communicate with actual or potential class members. *See In re Halkin, supra,* 598 F.2d at 184 n.15; *Goldblum v. National Broadcasting Corp.,* 584 F.2d 904, 907 (9th Cir. 1979).

Thus despite the filing provision, and the arguable "good faith" defense, the order has the "immediate and irreversible" effect of a prior restraint.

V. *The expression that is restrained is protected*

[8-10] Inquiry does not end with a determination that the order constitutes a prior restraint. The First Amendment is not absolute, and "the protection even as to previous restraint is not absolutely unlimited." *Near v. Minnesota, supra,* 283 U.S. at 716, 51 S.Ct. at 631, 75 L.Ed. at 1367; *accord, Times Film Corp. v. Chicago,* 365 U.S. 43, 81 S.Ct. 391, 5 L.Ed.2d 403 (1961); *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957). Material unequivocally not protected by the Constitution may be the subject of a prior restraint if sufficient procedural safeguards are provided. This possibility does not exist in the present case because the communications proscribed by the order are constitutionally protected. Also, as discussed in Part VI, below, procedural safeguards are entirely lacking.

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does not eliminate—indeed it highlights—the overbreadth and resultant chilling effect of the Manual's proposed rule.

Note, 88 Harv. L. Rev. 1911, 1922 n. 74 (1975). *See also Zarate v. Younglove,* 22 FEP Cases 1025, 1042 (C.D. Cal. 1980).

22. The deficiencies are present in both the order and the suggested local rule. *See* n. 6 *supra.*

The restraint on counsel's right to talk with potential class members about the case is plenary. The restraint is not limited to prohibiting solicitation of potential clients. The attorneys may not counsel a black employee free of any effort to solicit him. We have already noted, at the beginning of Part IV, the concern expressed by the Third Circuit in *Rodgers I*, 508 F.2d at 162-63, 165, over the constitutional problems raised by conditioning access to class action procedures upon prohibiting communications between counsel and potential class members.

In addition to the general restraint on attorneys there is a specific restriction against solicitation in subparagraph (a) of ¶ (2) of the order which forbids "solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action." *NAACP v. Button, supra*, and its progeny, *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), *United Transportation Union v. State Bar*, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971), *United Mine Workers v. Illinois Bar Association*, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967), and *Brotherhood of Railroad Trainmen v. Virginia State Bar*, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964), mandate the conclusion that subparagraph (a) proscribes constitutionally protected expression. In *Button*, the Court concluded that NAACP solicitation of persons to bring civil rights suits was protected activity under the First and Fourteenth amendments. 371 U.S. at 428-29, 83 S.Ct. at 335, 9 L.Ed.2d at 415.[23] The solicitation was treated as a mode of political expression effectuated through group activity falling with the sphere of associational rights

23. Because this case involves a restriction imposed by a federal court, the Fourteenth Amendment is not implicated.

guaranteed by the First Amendment. The solicitation activities considered in *Button* included holding meetings to explain legal steps needed to achieve desegregation. At these meetings forms were circulated which authorized Legal Defense Fund attorneys "to represent the signers in legal proceedings to achieve desegregation." 371 U.S. at 421, 83 S.Ct. at 332, 9 L.Ed.2d at 411.

In view of Gulf's statements to the trial court and the countering affidavit by plaintiffs' attorney, we do not know whether there has been express solicitation in this case similar to the distribution of forms in *Button*. Whether plaintiffs' attorneys' attendance at the meeting was solicitation is not determinative. Here, as in *Button*, the subject matter is racial discrimination. Plaintiffs' attorneys are already engaged on behalf of black employees in seeking to vindicate their civil rights through court action, while in *Button* they were seeking clients to begin a suit. In both cases the activities at issue are those of Legal Defense Fund lawyers. The only material difference is that here employees must choose between the lawsuit and a conciliation offer while in *Button* there had been no conciliation and offer. The people attending the meetings held by the Legal Defense Fund lawyers in *Button*, however, did have to choose between initiating a lawsuit and not participating in a lawsuit. The type of choice the people would have to make here and in *Button* is not so different that the solicitation that could have occurred in this case was outside the scope of activity protected by *Button*. The characteristics of the solicitation that brought it within constitutional protection in *Button* are equally present in this case. *See also Great Western Cities, Inc. v. Binstein*, 476 F.Supp. 827 (N.D. Ill. 1979) (holding rule

similar to district court's order constitutionally inapplicable to non-profit solicitation).

The continued vitality of *Button* was recently affirmed by the Supreme Court in *In re Primus, supra.* There the Court reversed a disciplinary reprimand issued against an ACLU lawyer for solicitation. The Court considered the economic relationship between the lawyer and the person solicited, the purpose of the litigation and the possibility of a conflict of interest between counsel and prospective client. Because the lawyer had no direct financial stake in the case, and the case was a means of expressing a political belief, and there was no evidence of overreaching or misrepresentation, the Court concluded that South Carolina's punishment of Primus for solicitation violated her First Amendment rights.[24] Counsel for plaintiffs here have submitted affidavits attesting to the fact that they neither received nor expect to receive from class members any compensation for their services.[25]

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24. *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), decided the same day as *Primus,* sustained, against constitutional objections, bar sanctions of an attorney for solicitation. For purely pecuniary gain, he visited in the hospital a person injured in an automobile accident and solicited her as a client. No political expression or associational rights or vindication of illegal racial discrimination was involved. Ohralik based his constitutional claim solely on the commercial speech doctrine. *See also Pace v. Florida,* 368 So.2d 340 (Fla. 1979); *Adler, Barish, Daniels, Levin & Creskoff v. Epstein,* 482 Pa. 416, 393 A.2d 1175 (Pa. 1978).

25. Thus, subparagraph (b) of ¶ (2) of the order is not directly applicable. Arguably this hypothetical restraint does no injury except to the extent it adds to the overall chilling effect. However, it is appropriate to comment on it since it is part of the *Manual's* form. In *United Transportation Union v. State Bar, supra,* the Supreme Court interpreted *Button* and cases following it to stand for the proposition that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of

[11] Of course, the communications of individual plaintiffs, also proscribed by the order, are at least equally protected. *See Brotherhood of Railroad Trainmen v. Virginia State Bar, supra; Great Western Cities, Inc. v. Binstein, supra.*

The communications covered by the order are thus protected expressions which call into play the full panoply of First Amendment safeguards against prior restraint.[26]

VI. *The prior restraint is not justified*

The order in this case is the essence of prior restraint —it places specific communications under the personal censorship of a judge. It is thus subject to the heavy presumption against its constitutionality and the rigid

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the First Amendment." *Id.* at 585, 91 S.Ct. at 1082, 28 L.Ed.2d at 347. In at least some situations the collection or solicitation of funds to defray litigation costs is a necessary adjunct to obtaining meaningful access to the courts. Such activity is therefore deserving of constitutional protection in appropriate cases. The degree of protection would vary according to the use to which the funds are to be put. If they are to be used to pay lawyers, the solicitation is closer to the heart of gaining access to the courts. *See Norris v. Colonial Commercial Corp.*, 77 F.R.D. 672, 673 (S.D. Ohio 1977) (solicitation of funds to defray litigation expenses of class action permitted with certain requirements imposed on the content of the solicitation letter). *See also Sayre v. Abraham Lincoln Federal Savings & Loan Ass'n*, 65 F.R.D. 379, 384-86 (E.D. Pa. 1974), *modified*, 69 F.R.D. 117 (1975); *see generally* Note, *Solicitation By Attorneys: A Prediction and a Recommendation*, 16 Houston L. Rev. 452 (1979).

26. We do not discuss at length the plenary provisions of subparagraph (d) of ¶ (2) concerning statements tending to misrepresent. That section merely compounds the unconstitutionality exhibited by the preceding sections by adding vagueness and overbreadth to its defects. *See Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (en banc); *Zarate v. Younglove*, 22 FEP Cases 1025, 1042 (C.D. Cal. 1980); *U. S. v. Marcano Garcia*, 456 F.Supp. 1354 (D. P.R. 1978); Note, 88 Harv. L. Rev. 1911, 1922 n. 74 (1975).

requirements imposed by the courts on those who seek to justify prior restraints. It must fit within one of the narrowly defined exceptions to the prohibition against prior restraints. It must prevent direct, immediate and irreparable damage, and it must be the least restrictive means of doing so. Finally, it must comport with required procedural safeguards. The order at issue meets none of these requirements.

[12] There is a strong presumption against the constitutionality of any prior restraint, and the burden of justification is therefore heavier than that imposed in cases involving only subsequent restrictions on freedom of expression. *Southeastern Promotions, Ltd. v. Conrad, supra; New York Times Co. v. U. S., supra; Organization for a Better Austin v. Keefe, supra; Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); *Near v. Minnesota, supra; Penthouse Int'l Ltd. v. McAuliffe, supra; Universal Amusement Co. v. Vance,* 587 F.2d 159 (5th Cir.), *aff'd,* ____U.S.____, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980).

[13] In general, a prior restraint may be justified only if the expression sought to be restrained "surely [will] result in direct, immediate, and irreparable damage." *International Society for Krishna Consciousness v. Eaves,* 601 F.2d 809, 833 (5th Cir. 1979), *quoting New York Times Co. v. U. S., supra,* 403 U.S. at 730, 91 S.Ct. at 2149, 29 L.Ed.2d at 834. At least three justices may have rejected even that standard as overly lenient, without explicitly defining the appropriate test. *See New York Times Co. v. U. S., supra,* 403 U.S. at 732-33, 91 S.Ct. at 2150-51, 29 L.Ed.2d at 835 (White, J., joined by Stewart, J., concurring), and 403 U.S. at 740-41, 91

S.Ct. at 2154-55, 29 L.Ed.2d at 840 (Marshall, J., concurring).[27]

[14] To be lawful, the restraint "must fit within one of the narrowly defined exceptions to the prohibition against prior restraints," *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1247, 43 L.Ed.2d at 459; that is, "[the] publication [sought to be restrained] must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea . . . ." *New York Times Co. v. U. S., supra,* 403 at 726-27, 91 S.Ct. at 2148, 29 L.Ed.2d at 832 (Brennan, J., concurring); *see also Whitney v. California,* 274 U.S. 357, 377, 47 S.Ct. 641, 71 L.Ed. 1095, 1106 (1927) (Brandeis, J., concurring) ("Only an emergency can justify repression"). Indeed, one commentator has interpreted *New York Times v. U. S.* to hold that "there is a constitutional requirement that everything, or virtually everything, is entitled to be published at least once." Kalven, *supra,* 85 Harv.L.Rev. at 34.

[15-17] The order is not brought within any exception permitting prior restraints merely because it arises in the general context of the administration of justice and the particular context of Rule 23. As the Third Circuit noted in *Rodgers I:* "[T]he interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment." 508 F.2d at 163. It is obvious that in the conduct of trial the judge restrains

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27. Justices Black and Douglas, adhering to their consistent rejection of any restriction on freedom of expression, also found the standard unacceptable. 403 U.S. at 714, 720, 91 S.Ct. at 2141, 2144, 29 L.Ed.2d at 825, 828.

expression and association in innumerable ways. But, "[w]hatever may be the limits of a court's powers in this respect, it seems clear that they diminish in strength as the expressions and associations sought to be controlled move from the courtroom to the outside world." *Id.*

[18, 19] The Supreme Court has recently reaffirmed that even when the competing interest is a criminal defendant's right to a fair trial, "the barriers to prior restraint remain high and the presumption against its use continues intact." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 570, 96 S.Ct. at 2808, 49 L.Ed.2d at 704. Other courts, including this one, have echoed this sentiment. "[B]efore a prior restraint may be imposed by a judge, even in the interest of assuring a fair trial, there must be 'an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.' " *U. S. v. Columbia Broadcasting System, Inc.,* 497 F.2d 102, 104 (5th Cir. 1974). A lawyer's First Amendment right to comment about pending or imminent criminal litigation can be proscribed only if his comments pose a " 'serious and imminent threat' of interference with the fair administration of justice." *Chicago Council of Lawyers v. Bauer, supra,* 522 F.2d at 249, *quoting In re Oliver,* 452 F.2d 111 (7th Cir. 1971). Even in the context of a criminal defendant's right to a fair trial, then, prior restraint is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 559, 96 S.Ct. at 2803, 49 L.Ed.2d at 697.

[20-22] If the exigencies of the Sixth Amendment do not lessen the burden on those who seek to justify prior

restraints, the interests of a civil litigant cannot do so. *See Hirschkop v. Snead, supra,* 594 F.2d at 373. The "interest of the judiciary in the proper administration of justice does not authorize any blanket exception to the first amendment." *Rodgers I, supra,* 508 F.2d at 163. Thus, the general presumption against prior restraints is not mitigated by a claim that the fair and orderly administration of justice is at stake.[28]

[23-28] Nor does Rule 23, as a specific aspect of the administration of justice, create an exception to the

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28. We must distinguish two types of cases as only peripherally relevant to the inquiry at hand. *Craig v. Harney,* 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947), and *Bridges v. California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), and their progeny limited the circumstances under which courts may impose contempt sanctions for free expression that is subsequently deemed prejudicial to the administration of justice. Because the contempt in those cases was not based on violation of an explicit order, however, the cases "deal with problems substantially different from those raised by prior restraint." *Nebraska Press Ass'n v. Stuart, supra,* 427 U.S. at 557 n.5, 96 S.Ct. at 2802, 49 L.Ed.2d at 696 n.5; *see also Rodgers v. U. S. Steel Corp.,* 536 F.2d 1001, 1008 n.15 (3d Cir. 1976) (*Rodgers II*); Schmidt, Nebraska Press Association: *An Expansion of Freedom and Contraction of Theory,* 29 Stan. L. Rev. 431, 472 (1977). Thus, the *Manual's* conclusion that *Craig* and *Bridges* authorize the suggested order, Part 1, § 1.41 n.33 (1977 ed.), is mistaken insofar as the order is a prior restraint and governed by a more stringent standard. *See* Wilson, *Control of Class Action Abuses Through Regulation of Communications,* 4 Class Action Reports 632, 634 (1975).

We also find *Gannett Co. v. DePasquale,* 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979), and its antecedent inapposite. We are dealing here not with the right of reporters to gather information but with the right of individuals to disseminate it. *See, e. g., Houchins v. KQED, Inc.,* 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978); *U. S. v. Gurney,* 558 F.2d 1202 (5th Cir. 1977), *cert. denied,* 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978). Protecting secrecy by excluding the press is not to be equated with preventing publication. *See* Sack, Principle and Nebraska Press Association v. Stuart, 29 Stan. L. Rev. 411, 428 (1977); Stevens, *Some Thoughts About A General Rule,* 21 Ariz. L. Rev. 599 (1979).

principals governing prior restraints.[29] *See Rodgers v. U. S. Steel Corp.*, 536 F.2d 1001, 1008 (3d Cir. 1976) *(Rodgers II)* (suggesting, in context of class action, that test is "clear and present danger or a reasonable likelihood of a serious and imminent threat to the administration of justice"). The validity of a prior restraint entered under Rule 23 must be tested by the same standards utilized in other contexts. Subdvision (d) of Rule 23, which authorizes the court, in its discretion, to make appropriate orders in class actions, was designed to further "the fair and efficient conduct of the action . . . ." Advisory Committee Notes to Rule 23. Like the common law contempt power at issue in *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947), and *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), the court's discretion under Rule 23 is a facet of its general authority to regulate the conduct of litigation. To the extent that Rule 23 implements the class action as a unique litigation device, that discretion may be correspondingly broadened, and we recognize broad management powers of the court under Rule 23. But, while a legislative enactment may alter the court's authority under common law, it may not encroach upon constitutionally protected rights. Prior restraints are no less suspect in a statutory setting than they are in a constitutional context. *Allen v. Monger*, 583 F.2d 438, 442 (9th Cir. 1978), *pet. for cert. filed sub nom., Brown v. Allen*, — U.S. —, 100 S.Ct. 1003, 62 L.Ed.2d 745 (1978). We cannot interpret Rule 23 as authorizing

29. The district court never certified a class in this case. Arguably a court may have broader power over an actual class action than a putative class action, but the presence or absence of certification does not materially affect the considerations that we view as controlling.

prior restraints without rewriting the First Amendment and the gloss put upon it by the Supreme Court. This, of course, we are not at liberty to do. Moreover, the Rules Enabling Act, 28 U.S.C. § 2072, explicitly provides that the Rules "shall not abridge, enlarge or modify any substantive right." Finally, much of the communication prohibited by the order is both constitutionally protected and consistent with the purposes of the class action. *See Coles v. Marsh,* 560 F.2d 186, 189 (3d Cir.), *cert. denied,* 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977); n.30 *infra.*

[29-30] An exception to the constitutional principles limiting prior restraints cannot be construed on the foundation of asserted potential abuses in class actions generally. In the first place, the hypothesis that abuses occur with such frequency and impact that prophylactic judicial intervention is required must be examined with the same scrutiny as other factual hypotheses. Neither the Constitution nor the judge's duty of constitutional fact finding is subsumed by the application of the pejorative word "abuse." Not everything that tends to make a class action less convenient than ideal, or more difficult to manage, is an "abuse." The same is true of such activities as solicitation of clients, or funds, or community support, that may be constitutionally protected but, at least to some, may appear only marginally ethical.[30] The

30. In *Coles v. Marsh,* 560 F.2d 186 (3d Cir.), *cert. denied,* 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977), a race/sex discrimination in employment case, the basis for an order banning communication by plaintiff and her lawyer was plaintiff's deposition in which she indicated that she had contacted and would continue to contact potential class members with the hope of interesting them in participating in the suit and had contacted the NAACP to enlist its support, financial and otherwise, and proposed to contact other

frequency and the effect of genuine abuses in class actions in general are not revealed by any empirical data made known to us, and judges may differ widely in their individual assessments. The *Manual* expressly recognizes that "abuse" of the class action is a rare occurrence, an exception and not the rule:

> It must be noted, however, that, generally, the experience of the courts in class actions has been favorable. The aforementioned abuses are the exceptions in class action litigation rather than the rule. Nevertheless, they support the idea that it is appropriate to guard against the occurrence of these relatively rare abuses by local rule or order.

Manual, Part I, § 1.41, p. 31 (1977 ed.). Its rationale is that it is desirable to anticipate and prevent these infrequent occurrences before they happen.[31]

In any event, the potential abuse rationale is at odds with the requirement that a prior restraint is only justified in exceptional circumstances and by a showing of direct, immediate and irreparable harm. Whether such a showing can be made may be affected by a host of factors: the occurrence of misconduct or the threat of it, the composition and size of the class, the nature of the claim,

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organizations for the same purpose. The Third Circuit rejected the argument that these were abuses and held they affectuated the purposes of Rule 23 by encouraging participation in plaintiff's race/sex discrimination claim and that the district court had no power to restrain them.

31. *Compare Bulletin of Recent Developments, Manual for Complex Litigation,* Aug. 25, 1978, p. 7:

> Experience continues to teach that, because of the vast and ever-present potential for abuse of the class action through unauthorized communications in many unpredictable forms, it is dangerous to await the occurrence of an abuse before trying to correct it.

the historical policies of the district court in administering class actions, the identity, experience and standards of the lawyers, the mores of the bar, the necessity for discovery and many others. None of the four major potential abuses listed by the *Manual* presents any direct or immediate threat to the litigation in this case. Solicitation of clients is protected here under *Button and Primus. See* pp. 471-473, *supra.* The possibility of solicitation of funds is controverted by affidavits. *See* n. 25 *supra.* Solicitation of opt-out requests is not relevant to this Rule 23(b)(2) case. Finally, nothing justifies any inference in this case that communications are likely to "misrepresent the status, purposes and effects of the . . . action and of . . . [the] Court orders therein."

[31] There are other prerequisites to justification of a prior restraint. It must not sweep too broadly. Rather it "must be narrowly drawn and cannot be upheld if reasonable alternatives are available having a lesser impact on First Amendment freedoms." *CBS, Inc. v. Young,* 522 F.2d 234, 238 (6th Cir. 1975); *see also Nebraska Press Association v. Stuart, supra; Carroll v. Commissioners of Princess Anne,* 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968). There are alternatives to a total ban on communications. *See* n. 13 *supra; Developments in the Law—Class Actions,* 89 Harv.L.Rev. 1318, 1600-1604 (1976); Wilson, *Control of Class Action Abuses Through Regulation of Communications,* 4 Class Action Reports 632 (1975). The order before us suppresses essentially everything, and one seeking to exercise his right to speech or association must petition the court.[32]

32. It is obvious that overbreadth is inevitable under a system by which plenary restraints are imposed automatically by rule or order in every actual or potential class action.

No showing has been made, or even offered, that reasonable alternatives with lesser impact are unavailable.

[32] Finally, the restraint "must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S. at 559, 95 S.Ct. at 1247, 43 L.Ed.2d at 459. There are none here: no evidence, no way to test the potential abuse premise, no findings of particular abuses present or threatened, and no conclusions of law (except as to the desirability of conciliation). Obviously, there never can be procedural safeguards if by rule or order a wholesale restraint is directed in every case and those restrained are able to escape its impact only by showing good cause to be excepted or risking the vagaries of an arguable good faith defense.

[33] The remaining justification for the order is the district judge's reference to his obligations to encourage private settlement of Title VII charges. *U. S. v. Allegheny-Ludlum Industries,* 517 F.2d 826, 846 (5th Cir. 1975), *cert. denied,* 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1976). The notice sent by the clerk gave judicial recognition to the conciliation agreement and extended the time during which employees could accept Gulf's offer while at the same time giving notice of the pendency of this suit. But, as we noted in *Allegheny-Ludlum,*

> the "final responsibility for enforcement of Title VII is vested with federal courts," . . . [T]he various legal remedies for employment discrimination are cumulative and complementary. From the grievant's standpoint, "[u]nder some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true."

Id. at 848 & n.26, *quoting Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147, 156 (1974), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 461, 95 S.Ct. 1716, 1720, 44 L.Ed.2d 295, 302 (1975). In *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974), *vacated on other grounds*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), we commented on the possible divergence of governmental interests in remedying employment discrimination and the interests of the individuals who were the victims of discrimination:

> While the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restituition.

Id. at 66. The choice between the lawsuit and accepting Gulf's back pay offer and giving a general release was for each black employee to make. The court could not make it for him, nor should it have freighted his choice with an across-the-board ban that restricted his access to information and advice concerning the choice.

[34, 35] We therefore hold that the district court's order restricting communication by parties and their counsel with actual and potential class members is an unconstitutional prior restraint.[33] This holding makes it unneces-

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33. While we hold that the order is a prior restraint, the unconstitutionality of the order does not rest on that ground alone. Even under the more relaxed analysis accorded subsequent restraints the order fails to pass constitutional muster. Much of the order is vague and overbroad. *See* n.26 *supra; see also Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied*,

sary for us to consider whether the order violates the First Amendment associational rights of either the individual plaintiffs or their attorneys. *See Rodgers I, supra,* 508 F.2d at 163; *Great Western Cities, Inc. v. Binstein, supra,* 476 F.Supp. at 834; *cf. NAACP v. Alabama ex rel Patterson,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (requiring NAACP to submit membership lists infringes associational rights); *Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960) (requiring list of organizations to which individual belongs or contributes infringes associational rights); *Robinson v. Reed,* 566 F.2d 911 (5th Cir. 1978) (requiring disclosure of facts about beliefs or associations infringes rights of privacy and association).[34]

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427 U.S. 912, 96 S.Ct. 3201, 49 L.Ed.2d 1204 (1976). Even a legitimate governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231, 237 (1960); *see also Village of Schaumberg v. Citizens for a Better Environment,* _____U.S._____, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) (restriction invalid if purpose "could be sufficiently served by measures less destructive of First Amendment interests"). Moreover, the circumstances under which the order was issued do not meet any of the previously articulated standards governing restriction of constitutionally protected expression. *See, e. g., Village of Schaumberg v. Citizens for a Better Environment, supra* (regulation "intimately related to substantial governmental interests"); *Hess v. Indiana,* 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) (speech "intended to produce, and likely to produce, *imminent* disorder"); *Brandenburg v. Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (speech "brigaded with action") (Douglas, J., concurring); *Bridges v. California,* 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941) ("clear and present danger"); *Chicago Council of Lawyers v. Bauer, supra* (speech must pose " 'serious and imminent threat' of interference with the fair administration of justice").

34. We have also pretermitted discussion of the order's limitations on access to and dissemination of discovery materials as possibly implicating both the First Amendment, *In re Halkin, supra,* 598 F.2d

VII. *The order violates Rule 23*

[36] Because we hold that the order violates the First Amendment, it follows that it cannot be an "appropriate order" under Rule 23(d) of the Federal Rules of Civil Procedure.[35]

The order of the district court restricting communications by named plaintiffs and their counsel with actual and potential class members is VACATED, the judgment of the district court is REVERSED and the case is REMANDED to the district court for proceedings consistent with this opinion.

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at 188-89, and the due process clause of the Fifth Amendment, *Gouldman v. Seligman & Latz of Houston, Inc.*, 82 F.R.D. 727, 728 (S.D. Tex. 1979). *See Waldo v. Lakeshore Estates, Inc.*, 433 F.Supp. 782, 787 (E.D. La. 1977); Note, 88 Harv. L. Rev. 1911, 1919 (1975). The *Manual* itself notes the risk that barring contact with class member-witnesses may violate due process:

> In many such cases, the class members will have knowledge of facts relevant to the litigation and to require a party to develop the case without contact with such witnesses may well constitute a denial of due process.

Manual, Part I, § 1.41, p. 29 (1977, carried forward from 1973 ed.).

Additionally, we have not considered whether the order may violate the Fifth Amendment privilege against self-incrimination by compelling those who may have disobeyed it to produce testimonial evidence describing their transgressions. *See U. S. v. White*, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944); *U. S. v. Authement*, 607 F.2d 1129 (5th Cir. 1979).

35. Other circuits have reached conflicting conclusions as to the propriety under Rule 23 of similar orders. *Compare Rodgers I, supra with In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1138 n.57 (7th Cir.), *cert. denied*, 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 (1979).

TJOFLAT, Circuit Judge, with whom JOHN R. BROWN, GEE, HENDERSON and REAVLEY, Circuit Judges, join, specially concurring:

I concur only in the result because I believe the majority's analysis inexcusably ignores the principle that "a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." *Hagans v. Lavine,* 415 U.S. 528, 547, 94 S.Ct. 1372, 1384, 39 L.Ed.2d 577 (1974). The non-constitutional ground that would dispose of the case is that the district court abused its discretion when, without making findings of fact, it entered the order restricting the parties' and counsel's communications with actual or potential class members who were not formal parties.

The majority's analysis begins with an examination of the "basis" of the order. The opinion immediately rejects the notion that the district court's order could have rested on Gulf Oil Company's unsworn allegations that one of the plaintiffs' attorneys had improperly communicated with actual or potential class members who were not formal parties: "We can assume that the district court did not ground its order on a conclusion that the charges of misconduct made by Gulf were true. Nothing in its order indicates that it did . . . ." *Ante* at 466. Even if the district court *had* based its order on a conclusion that Gulf's charges were true, the opinion reasons, "such a conclusion would have been procedurally improper and without evidentiary support." *Id.* Therefore, the majority "presumes" that the district court must have based its order "upon the rationale of the [*Manual for Complex Litigation*] that the court has the power to enter a ban on communications in any actual or potential class action as

a prophylactic measure against potential abuses envisioned by the *Manual." Id.*

Logic and sound jurisprudence insist that the majority next consider the procedural propriety and evidentiary support of an order founded solely on the rationale and model order of the *Manual.* Instead, the opinion inexplicably leaps to the question of the constitutionality of the *Manual's* suggested order and holds that the order is an unconstitutional prior restraint. Since the district court's order was based entirely on the model order and policy consideration set out in the *Manual,* it follows that the district court's order is unconstitutional as well. The opinion then belatedly and, in light of the disposition of the constitutional issue, somewhat gratuitously turns to the question of procedural propriety, concluding that an unconstitutional order cannot be "appropriate" within the meaning of Fed.R.Civ.P. 23(d).

In my view, the federal policy of avoiding unnecessary constitutional rulings requires that this court reserve consideration of the first amendment problems that the district court's order may raise and address first the question of the district court's authority to issue the order. As Judge Godbold persuasively demonstrates in his dissenting opinion to the panel decision, the district court misused its discretion in entering the order in this case. *Bernard v. Gulf Oil Co.,* 596 F.2d 1249, 1262-76, *vacated,* 604 F.2d 449 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part). Therefore, we need not reach the constitutional question.

Rule 23(d) permits district courts, in conducting class actions, to "make appropriate orders: . . . (3) imposing conditions on the representative parties . . . ." Although

this provision gives a district court "extensive power" to manage a class action, 7A C. Wright & A. Miller, Federal Practice and Procedure § 1791 at 192 (1972), the orders that a court issues pursuant to the rule are certainly subject to review for abuse of discretion. *In re Nissan Motor Corporation Antitrust Litigation,* 552 F.2d 1088, 1096 (5th Cir. 1977). As this court observed in *Nissan,* "Appellate review is necessary to assure that the rights of absentee class members are not inundated in the wake of a district court's brisk supervision." *Id.* The reviewability of rule 23(d) orders is also implicit in the language of the rule. The district court is limited to issuing those orders that are "appropriate." If this constraining language is to be effectual, rule 23(d) orders must be reviewable by the courts of appeals.

Since rule 23(d) orders are reviewable, it follows that such orders must be based on findings of fact:

> [I]ssuance of an order . . . without an adequate statement of the reasons for the order does not meet minimum standards of procedural fairness and regularity. . . . Nor does an order issued without a deliberate articulation of its rationale, including some appraisal of the factors underlying the court's decision, allow for a disciplined and informed review of the court's discretion.

Sargeant v. Sharp, 579 F.2d 645, 647 (1st Cir. 1978) (citations omitted) (vacating and remanding district court's order denying attorney fees to successful civil rights plaintiff). *Cf. Fed.R.Civ.P.* 52(a) ("in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action").

The general principle restated by the *Sargeant* court applies to any court order that is based on the court's assessment of conflicting evidence or policy considerations. I see no reason to suppose that the principle is not pertinent here. A request for a rule 23(d) order restricting communications between counsel and potential or actual class plaintiffs is not essentially different from an ordinary petition for a preliminary injunction.[1] Communications like those prohibited by the district court's order certainly create a potential for abuse, but they may also be beneficial. For example, such communications, "in many instances serve to effectuate the 'purposes of Rule 23 by encouraging common participation in [a lawsuit].' " *Bernard v. Gulf Oil Co.*, 596 F.2d at 1268 (Godbold, J., dissenting) (*quoting Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir.), *cert. denied*, 434 U.S. 985, 98 S.Ct. 611, 54 L.Ed.2d 479 (1977). Just as if it had been faced with a request for an injunction, the district court should have ruled on Gulf's motion for an order restricting communications only after weighing, on the record, the potential for abuse that would be generated by permitting free communications between the parties and class members against the benefits flowing from such communications.

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1. Judge Godbold makes this point nicely in his panel dissent:
> The wide disparity between what was done here and normal judicial procedures is demonstrated by posing this question: "What would have happened if Gulf had asked for a temporary injunction imposing the exact restrictions that were imposed in this case?" I believe that the court would have insisted upon requirements of notice, time limits, proof of likelihood of harm, the public interest and similar familiar requirements, and this court would have reviewed an injunction under the usual standards, especially since constitutional rights are involved.

Bernard v. Gulf Oil Co., 596 F.2d 1249, 1270, *vacated* 604 F.2d 449 (5th Cir. 1979) (Godbold, J., concurring in part and dissenting in part).

As in the ordinary case involving a request for a temporary injunction, the burden of proof would be on the movant—here, Gulf. To meet its burden of proof, Gulf would have to make "a factual showing . . . that unsupervised communications between counsel and named plaintiffs on one hand and potential class members on the other have materialized into actual abuses of the class action device or that abuses are imminently threatened." *Bernard v. Gulf Oil Co.*, 596 F.2d at 1267 (Godbold, J., dissenting).

As the majority opinion notes, the district court entered the order in this case without making any findings of fact. The only "evidence" Gulf presented that the restricted communications would lead to abuses was unsworn allegations of misconduct on the part of one of the class attorneys, and the accused attorney denied the charge under oath. Even if the district court had explicitly based its order on Gulf's charges, I would find that entry of the order was an abuse of discretion on the ground that Gulf had not conceivably met its burden of proof. It is still more clear that the Court abused its discretion by issuing the order without elucidating *any* factors that contributed to its decision.

The absence of any findings of fact leads the majority to conclude that the district court founded its order on the *Manual for Complex Litigation's* model order and rationale. *Ante* at 466. In my view, the record does not adequately support this conclusion. The district court cited the *Manual* not to justify the imposition of the order, but to defend the order from plaintiffs' First Amendment attack: "[T]his order comports with the requisites set out in the *Manual for Complex Litigation*,

Section 1.41, p. 106 CCH Edition 1973, which specifically exempts constitutionally protected communication when the substance of such communication is filed with the Court." *Record* at 128e. The court's mere mentioning of the *Manual* obviously does not constitute the deliberate articulation of rationale that is necessary if there is to be any possibility of meaningful review.

Moreover, even if the court had relied explicitly on the rationale of the *Manual's* model order to support the order, the court's entry of the order would have been procedurally improper. The *Manual* is not a source of authority with the force of a statute or rule of civil procedure. Therefore, a trial court could not evade its responsibility to make findings of fact on the record simply by relying on the *Manual.* In other words, it would have been an abuse of discretion for the court to have adopted the *Manual's* apparent conclusion that a court order restricting communications is appropriate in *every* class action. This is because the validity of the *Manual's* analysis and conclusion is not the sort of undisputed knowledge that would justify what would be, in effect, judicial notice. Since there is reason to believe that communications between counsel and actual and potential class members are not *always* abusive of the class action device, "[t]he *Manual's* general discussion of potential abuses flowing from unrestrained communications is no substitute for reasoned inquiry into the harms and benefits on the particular facts of each case." *Bernard v. Gulf Oil Co.,* 596 F.2d at 1268 (Godbold, J., dissenting).[2]

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2. Of course, there are some communications that a court may restrict, in the interests of the administration of justice, without making findings or even considering the facts of the particular case. For example, a trial judge may certainly instruct members of the

For the reasons I have stated, I would hold that the district court abused its discretion when it entered the order restricting communications. I think this conclusion is unavoidable, whether the order is viewed as based upon the trial judge's assessment of the particular case before him or as based on the *Manual's* general discussion of potential abuses. Therefore, I must regard the majority's first amendment analysis as a needless excursion into a difficult and little-explored area of constitutional law.[3]

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jury not to discuss a case with anyone while the trial is in progress. The crucial difference between this example and the case before us is that, first amendment considerations aside, there could be no purpose served by permitting the jury to discuss a case during the trial, while it is not open to question that such communications would always pose an imminent threat to the fair administration of justice. On the other hand, communications like those enjoined in the present case might actually benefit the judicial process through serving the rule 23 policy of encouraging common participation in a lawsuit. *See* p. 464, *supra*.

3. Although the majority concludes that the order in this case was an unconstitutional prior restraint, the opinion certainly does not preclude a district court's entering an order similar to the *Manual's* model order after making a proper finding of facts. The majority condemns only restrictions of communications "constructed on the foundation of asserted potential abuses in class actions generally," *ante* at 475, and admits that a "prior restraint" may be justified "by a showing of direct, immediate and irreparable harm." *Ante* at 476.

FAY, Circuit Judge, with whom COLEMAN, Chief Judge, and RONEY, Circuit Judge, join, special concurring statement:

The majority of the *en banc* court adopts parts I, II and III of the panel opinion found at 596 F.2d 1249. As to the order dealing with communications by named parties and their counsel with any actual or potential class member not a formal party, I adopt parts I and II of Judge Godbold's original opinion, concurring in part and dissenting in part from the panel majority. 596 F.2d at 1262. In my opinion the order was "inappropriate" under Rule 23 and an abuse of discretion in this case. So concluding, I would not reach the constitutional issues.

JAMES C. HILL, Circuit Judge, dissenting:

I cannot agree that an order restricting the conduct of attorneys and their clients in connection with an ongoing lawsuit should be scrutinized under the First Amendment. I believe that during the pendency of a lawsuit the judge may restrict speech and conduct which in a different setting would be protected by the First Amendment. A precedent which requires that such orders be scrutinized under the First Amendment is a dangerous one with the potential for consequences not intended by the majority.

The propriety of this order should be tested only under Rule 23's appropriateness standard. Under the facts of this case, I would hold that the order was appropriate.

JUDGMENT ON REHEARING EN BANC

[Caption Omitted in Printing]

Filed July 17, 1980

Before COLEMAN, Chief Judge, BROWN, GODBOLD, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON and THOMAS A. CLARK, Circuit Judges.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, vacated; the judgment of the said District Court is hereby reversed, and this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plantiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

June 19, 1980

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* Judges Goldberg, Ainsworth and Charles Clark did not participate in the consideration or decision of this case.

Tjoflat, Circuit Judge, with whom Brown, Gee, Henderson and Reavely, Circuit Judges, join, concurring in the result.

Fay, Circuit Judge, with whom Coleman, Chief Judge, and Roney, Circuit Judge, join, specially concurring.

Hill, Circuit Judge, dissenting.

Issued as Mandate: July 15, 1980

Clerk, U.S. Court of Appeals,
Fifth Circuit

By: BRENDA HAUCK
Deputy
New Orleans, Louisiana

ORDER ALLOWING CERTIORARI

[Caption Omitted in Printing]

Filed December 8, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted limited to Question 1 presented by the petition.